

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EAGLE VIEW TECHNOLOGIES,)	15-CV-7025
INC, et al,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
XACTWARE SOLUTIONS, INC, et al,)	Camden, NJ
)	October 5, 2017
Defendants.)	2:03 p.m.

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE JOEL SCHNEIDER
UNITED STATES MAGISTRATE JUDGE

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*Speaker identification was not stated as new speakers spoke up

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1 (The following was heard in open Court at 2:03 p.m.)

2 THE COURT: Good afternoon, everybody. Please be
3 seated.

4 ALL COUNSEL: Good afternoon, Your Honor.

5 THE COURT: A lot of blue suits in this room. We're
6 on the record in Eagle View Technologies vs. Xactware
7 Solutions, et al, Docket Number 15-7025. Let's start with the
8 entries of appearance for the plaintiff.

9 MR. RUIZ: Sure. Good afternoon, Your Honor, Hector
10 Ruiz from the law firm of Walsh, Pizzi, O'Reilly, Falanga, for
11 plaintiff and I have my colleague Eleonore Ofosu-Antwi of the
12 same law firm, and I have my colleagues from Kirkland & Ellis,
13 Brandon Brown, Gianni Cutri, and Adam Alper.

14 MR. ALPER: Good afternoon, Your Honor.

15 THE COURT: Welcome. Somebody back there?

16 MR. DE VRIES: And I'm Mike De Vries, also from the
17 law firm of Kirkland & Ellis, Your Honor.

18 THE COURT: Welcome.

19 MR. CHRISTIE: Good afternoon, Your Honor, from the
20 law firm of Scott -- I'm sorry, of McCarter & English, Scott
21 Christie with my partner Lee Bromberg and my colleague Brian
22 Larivee. We represent the Defendants Verisk and Xactware.

23 THE COURT: So we're here for oral argument on
24 defendant's motion to strike and plaintiff's cross-motion to
25 amend. Counsel, just so you know, I'm going to reserve

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1 decision today but you should receive the Court's ruling
2 promptly. There's a lot to cover today and this is how I'd
3 like to proceed.

4 I just have some general background questions that
5 won't take too long, and then as I see it, I think that
6 defendants did a good job identifying the seven discreet
7 issues that we have to decide, and what I'd like to do is deal
8 with one issue at a time. We'll hear from the defendant,
9 we'll hear from the plaintiff, and then we'll move on to the
10 next issue.

11 To make sure we're on the same page, these are the
12 seven issues that I have, counsel: the doctrine of
13 equivalents, 35 USC 271(f) and (g); the ground point theory
14 and the 436 patent; infringement contentions; the area of
15 triangulation language in the 436 patent; the area of
16 triangulation language particularly for "receiving an
17 indication of a feature," and "modifying a three-dimensional
18 model limitation."

19 The sixth issue is the source code issues where
20 defendants want to strike Bates numbers higher than XWSC648;
21 and the last issue is the priority and invention dates not in
22 the 12/15 infringement contentions. Related to that is the
23 issue of whether plaintiffs can assert one or more priority
24 dates.

25 Now, I'm happy to address any issue you want, but as

Colloquy

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1 I read the papers, those were the issues that I identified.
2 Are there any issues, counsel, that you can think of at this
3 moment that the Court missed?

4 MR. RUIZ: No, Your Honor, that list sounds complete
5 to us.

6 MR. CHRISTIE: Likewise from defendants, Judge. But
7 for the sake of ease of argument, I think your items three
8 through five, the ground point issue and the two aero-
9 triangulation issues sort of collapse into one.

10 THE COURT: I don't disagree.

11 MR. CHRISTIE: Okay. So I just wanted to provide
12 that bit of guidance.

13 THE COURT: I don't -- I studied the papers, I spent
14 a lot of time on this and I really want to get to the crux of
15 this. I don't want you to waste your time, so I just want to
16 give you some preliminary thoughts.

17 To the extent that the plaintiffs argue or will
18 argue that the Court gave them carte blanche to make any
19 supplement or amendment that they wanted to, they're wrong.
20 The Court disagrees with that notion and that wasn't what the
21 Court ordered.

22 The Court gave plaintiffs leave to supplement their
23 invalidity contentions. The Court did not grant plaintiffs
24 leave to amend their contentions at their whim. The Court did
25 not dispense that the requirement in the local rule that in

Colloquy

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1 order to amend a contention you have to show good cause -- we
2 know what the elements of good cause are, diligence/prejudice,
3 and that's how the Court sees it.

4 So as the Court sees it, the way its analysis has to
5 proceed when it decides this -- these issues is one, it has to
6 decide whether or not plaintiff's additions are supplements or
7 amendments.

8 If the Court decides that plaintiff is merely
9 supplementing its contentions, defendant's motion is going to
10 be denied. If the Court decides that plaintiffs are seeking
11 to amend their contentions, the Court then has to determine if
12 there's good cause to amend the contentions.

13 If the Court finds that there is good cause,
14 plaintiff's cross-motion to amend is going to be granted, and
15 if the Court finds that plaintiffs did not establish good
16 cause to amend, defendant's motion to strike is going to be
17 granted and plaintiff's cross-motion is going to be denied.

18 I hope that this exercise that we're about to
19 undertake is a lesson to plaintiff about the mischief that
20 occurs when a party does not comply with the Local Rules of
21 Civil Procedure.

22 When the Court granted defendant's motion to compel
23 on May 1 with the order on May 2nd, the Court found that
24 plaintiff's disclosures were deficient and either explicitly
25 or implicitly, plaintiffs acknowledged that fact in my view as

Colloquy

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1 evidenced by the fact that they included more fulsome
2 explanations in their briefs that they didn't include in their
3 contentions, which evidence that they did not disclose all the
4 information in their possession.

5 And as a result of that, we now have to deal with
6 these briefs, we now have to deal with these motions and there
7 could be significant consequences for the client and all this
8 could have been avoided if the plaintiffs had done what the
9 local rules require at the outset, full and complete and
10 fulsome infringement contentions.

11 The boilerplate couldn't be clearer, you have to
12 crystalize your theories. There is no shifting sands case
13 after case after case after case -- it says the same thing,
14 and this is a perfect example why the rules are set up as they
15 are, so we don't have to go through complex motions like this
16 to deal with issues which in the Court's view were completely
17 unnecessary.

18 I'm not saying the plaintiff's motion is going to be
19 granted or denied or the same for the defendant. I'm just
20 saying that the reason we're here is because in the first
21 instance plaintiffs didn't do what they were supposed to do
22 and in the Court's view, there's no mistake about that, okay?

23 So what I'd like to do is just start with some very
24 basic questions. Am I correct that the Markman hearing in the
25 case is October 12th, 2017?

Colloquy

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1 MR. CHRISTIE: Yes, Judge. Scott Christie speaking,
2 that is correct.

3 THE COURT: Am I correct that no depositions have
4 been taken in the case yet?

5 MR. CHRISTIE: No, Judge, that is incorrect. As of
6 today, three fact witness depositions have been taken. We've
7 taken two depositions of their fact witnesses and they --

8 MR. RUIZ: Yes, Judge.

9 MR. CHRISTIE: -- they took a deposition of
10 Xactware's president.

11 THE COURT: Could you refresh the Court's
12 recollection about what the current fact discovery deadline in
13 the case is?

14 MR. CHRISTIE: Yes. Currently, Judge, the fact
15 discovery deadline is the 28th of December, at the end of the
16 calender year.

17 THE COURT: Last question. One of the themes
18 throughout defendant's briefs is that when they received
19 plaintiff's contentions -- might as well talk about the
20 December, '15 amended contentions, that maybe it was after
21 that, I don't know, that they regularly pointed out to
22 plaintiffs the deficiencies in their contentions -- this is
23 what defendant says, I'm not saying it's true or not -- the
24 defendants regularly pointed out the deficiencies in the
25 contentions and that plaintiff's retort was that their

Colloquy

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1 contentions were sufficient and in compliance with the rules
2 and then eventually you got to the position where they would
3 agree to supplement but only -- they had to take the
4 deposition first.

5 MR. CHRISTIE: Essentially that's correct, Judge.

6 THE COURT: Okay. Can you tell me when it was that
7 defendants started alerting, pointing out to plaintiffs about
8 the deficiencies in their contentions?

9 MR. CHRISTIE: Judge, I will check to see but I
10 believe that it was no later than the spring of 2016 that we
11 started to do it in earnest. But there were of course before
12 then oral discussions and a few letters of that vein, but it's
13 been at least a year.

14 THE COURT: And in your view -- and if the
15 plaintiffs disagree they can tell me, that even up until when
16 we argued your motion on May 1st, 2017 they were taking the
17 position that contentions were sufficient and we'll agree to
18 supplement, but we'll only do it after we take the deposition.

19 MR. CHRISTIE: That was their position, Judge,
20 yes --

21 THE COURT: Okay.

22 MR. CHRISTIE: -- up until that point in time.

23 THE COURT: Plaintiffs, anything to add? Do you
24 want to add anything to the record?

25 MR. CUTRI: Your Honor, Gianni Cutri for the

Colloquy

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1 plaintiff, we would disagree that our position was that we
2 were unwilling to supplement. Up through May 1st, as Your
3 Honor may recall, I think our position is we wanted to
4 supplement and during the hearing we made that -- we made
5 that --

6 THE COURT: You wanted to supplement but only after
7 you took a deposition.

8 MR. CUTRI: We believed at that time that a
9 deposition was appropriate because we had --

10 THE COURT: That was your position --

11 MR. CUTRI: That --

12 THE COURT: -- your position was you would not
13 supplement until you took that deposition.

14 MR. CUTRI: That's essentially correct, yes, Your
15 Honor.

16 THE COURT: Okay.

17 MR. CUTRI: And I would add that there was an
18 allowed supplement -- an allowed amendment in light of
19 information that was disclosed late by the defendants with
20 respect to the mass production tool.

21 We came to Your Honor, we proposed our supplemental
22 infringement contentions to Your Honor in the fall of 2016.
23 And when we proposed those, the defendants did not raise the
24 sufficiency issue with us in that context -- sufficiency of
25 the disclosures.

Colloquy

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1 Instead it was just a matter of timing. They just
2 said the timing was incorrect and so I would add that I -- in
3 October of 2016 -- it wasn't until after October, 2016 I think
4 it's fair to say we raised the issue of what they thought were
5 deficient contentions and so we would -- we would put the
6 timing a little bit differently.

7 And then it was January, 2017 when we brought that
8 issue to Your Honor, the dispute that we had, their request
9 for supplementation and our request for a deposition in
10 advance of supplementation.

11 THE COURT: Well, you said, defendant, that you
12 started to raise the deficiencies in the spring of 2016 --

13 MR. CHRISTIE: Correct.

14 THE COURT: -- and if I understood plaintiffs,
15 they're moving that date back to October of 2016.

16 MR. CHRISTIE: That's what I heard, Judge.

17 THE COURT: Do you agree?

18 MR. CHRISTIE: I do not agree. I don't know that we
19 can put our hand on it right now, but if Your Honor wishes a
20 supplemental submission to the Court on that issue, we can
21 certainly do that in short order.

22 THE COURT: But now I take it that would be in the
23 record of the motion to compel, wouldn't it -- those letters
24 going back and forth?

25 MR. CHRISTIE: Good point, Judge. It may. It may.

Colloquy

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1 We'd have to check and we could advise the Court
2 appropriately.

3 MR. CUTRI: Your Honor, if I can clarify on that
4 point, I think it's correct that they raised this issue on our
5 prior contentions in -- in the April, May time frame of 2016.
6 What I was pointing out is that we had another set of
7 contentions that we sent to them, proposed to them in the
8 fall, and at that point they did not raise -- to my
9 recollection sitting here today I don't think they raised
10 insufficiency at that time.

11 It was after that, those infringement contentions --
12 amended infringement contentions were allowed that they then
13 said oh, now we think that these are not sufficient --

14 THE COURT: Was there a court order?

15 MR. CUTRI: I believe that was by court order with
16 respect to the mass production tool. Yes, it was, it was.

17 THE COURT: Oh, I granted plaintiff's motion to
18 amend infringement contentions on October 28th --

19 MR. CUTRI: I believe that's -- that's what I'm
20 referring to.

21 THE COURT: -- and they were served on November 4.

22 MR. CUTRI: That's right.

23 THE COURT: And then after November 4 you still
24 deemed plaintiff's contentions to be inadequate?

25 MR. CHRISTIE: Correct, Judge. Part of your ordered

Colloquy

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1 supplementation was plaintiffs wanted to add something called
2 the mass production tool as a separate accused product.

3 THE COURT: Right.

4 MR. CHRISTIE: We disagreed. We advised the Court
5 that it was part of one of the already accused products, Your
6 Honor let them do it, that's fine. But by virtue of them
7 amending their contentions as part of the Court's order, it
8 didn't change the original deficiencies to the prior version
9 of the contentions, so it's not as if it was night and day,
10 two different sets of contentions.

11 The earlier one we had an issue with and the latter
12 one we did not have an issue with. It was a continuing
13 problem that Your Honor's allowance of amendment did not cure.

14 THE COURT: Are you saying that some of the same
15 complaints you had in April, 2016 still existed after the
16 November, 2016 amendments?

17 MR. CHRISTIE: Exactly, Judge. That's correct.

18 THE COURT: All right.

19 MR. CHRISTIE: In fact, all of them continued to
20 persist.

21 THE COURT: All right. The first issue we're going
22 to deal with is the doctrine of equivalents, and since it's
23 defendant's motion we'll hear from you first. I just have a
24 question or two.

25 MR. CHRISTIE: Yes, Judge, is it permissible if I

Colloquy

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1 address the Court from counsel table?

2 THE COURT: That's perfectly fine.

3 MR. CHRISTIE: Great.

4 THE COURT: So with regard to this theory, I want to
5 be clear, are we only talking about claim 1 in the 436 patent
6 and claim 2 in the 840 patent?

7 MR. CHRISTIE: I believe that's correct, Judge.

8 (Pause in proceedings)

9 MR. CHRISTIE: Correct, Judge, it's -- you know, to
10 the extent that they've asserted doctrine of equivalents
11 arguments at all, and we will check but we believe that Your
12 Honor's recollection is correct as to the scope of claims that
13 are affected by this new theory.

14 THE COURT: Are there any other claims that they're
15 asserting the DOE theory --

16 MR. CHRISTIE: No.

17 THE COURT: -- as to except these two claims?

18 MR. CHRISTIE: That's it, just those two claims,
19 Judge, correct.

20 THE COURT: Plaintiff, do you have any disagreement
21 with defendant's argument that there was no details or
22 explanation given as to your DOE theory until you served the
23 June 6th, 2017 second supplement amended contentions?

24 MR. CUTRI: No, Your Honor, we --

25 THE COURT: You don't --

Christie - Argument

17

1 MR. CUTRI: -- don't agree with that.

2 THE COURT: -- agree with that?

3 MR. CUTRI: I apologize. I was -- I was agreeing
4 with -- our detail was not disclosed -- the detail around the
5 DOE theory was disclosed on June 6th --

6 THE COURT: Okay.

7 MR. CUTRI: -- 2017.

8 THE COURT: I think we can agree on that. There was
9 the revelation in the footnote and there was the other
10 statement --

11 MR. CUTRI: That's correct.

12 THE COURT: -- that provided no detail. Okay. So
13 it's the Court's position I'm finding and I'm ruling that
14 plaintiffs are seeking to amend their invalidity contentions
15 to assert this DOE theory.

16 It's not a supplement. There's no reservations in
17 the local rules and they're really effectively starting from
18 scratch so it's an amendment in the Court's view.

19 So what we have to focus on now is whether there's
20 good cause to make this amendment so bear with me. Is it your
21 position, defendants, that as to this DOE theory the plaintiff
22 could have and should have asserted it with their December,
23 '15 invalidity contentions?

24 MR. CHRISTIE: Yes, Judge. As called for by the
25 local rules.

1 THE COURT: All right. And I think they're taking
2 the position that in April, 2016 the defendants proposed a
3 construction that required a single software model, is that
4 your understanding?

5 MR. CHRISTIE: That is our understanding, Judge.
6 There were some claim terms that we had thought at that time
7 required construction, including what you are referencing and
8 what you've seen in the briefs dealing with memory, dealing
9 with roof estimation module stored on the memory.

10 THE COURT: So we're going to hear from the
11 plaintiffs, but how do you respond to plaintiff's argument
12 that it wasn't until you proposed that construction and they
13 had knowledge of that construction that they should have
14 asserted the DOE theory?

15 MR. CHRISTIE: There's a couple folds to that,
16 Judge. First of all, as you know, there's an ordered measured
17 process with regard to the local rules. Plaintiffs are
18 required up front to give us the best information on a whole
19 host of issues, including doctrine of equivalents.

20 They were required to do it initially on December
21 7th -- December 15th. They did not do that. When I'm talking
22 about those claim construction issues, as Your Honor recalls
23 when the parties met and conferred as was required, submitted
24 a joint claim construction statement and ultimately winnowed
25 down the number of claim terms to be construed.

1 And in doing that, Judge, I think this time line
2 which is plaintiff's slide 14 -- defendant's slide 14 and
3 there's a copy -- a hard copy in front of you if you wish,
4 helps put this in perspective.

5 So we again, you know, back in the April, May time
6 frame, we were deciding on what terms needed to be construed
7 with regard to -- for purposes of claim construction and we
8 had the issues with the memory and the module on the memory.

9 But critically, Judge, for our perspective, with --
10 without any infringement theory including a doctrine of
11 equivalents theory on that issue, we felt it was safe to drop
12 that for construction.

13 It was only after we elected affirmatively to drop
14 those claims from construction that defendant now rides in at
15 the last minute and say ah ha, there's a weakness, there's a
16 vulnerability, now we can add our DOE theory and prejudice you
17 because we've got an advanced notice of your claim
18 construction position.

19 THE COURT: Why do you believe that they had enough
20 information in December, '15 to assert the DOE theory?

21 MR. CHRISTIE: Because, Judge, I think from our
22 perspective it was self-evident and that there was no need for
23 them to, you know, conduct any discovery or look at any claim
24 construction positions.

25 I mean, it's -- as Your Honor knows, they're hosting

1 the party if they're required to tell us what they think are
2 the infringement contentions of all stripes and varieties
3 including doctrine of equivalents. And more critically, you
4 know, from the claim language itself, it was crystal clear
5 what was at issue.

6 They raised, you know, as Your Honor remembers, 153
7 asserted claims which the Court forced them to winnow down and
8 don't need to belabor that because that's something that you,
9 Your Honor, clearly understands, but based upon the claim
10 language itself, it was -- it was obvious, it was a no-brainer
11 and if they were going to raise it they could have and should
12 have but did not raise it earlier.

13 THE COURT: Okay, plaintiff, what do you say to
14 defendant's argument that you should have raised this in
15 December, '15?

16 MR. CUTRI: Well, we -- we disagree obviously, Your
17 Honor, and I think if I could, I would like to give Your Honor
18 enough context around what the term is and a little bit around
19 what the technology is so that you can understand why we
20 wouldn't have been on notice from the outset of the case, we
21 wouldn't have been on notice in April and I'll tell you
22 when --

23 THE COURT: Well, you were on notice in April.

24 MR. CUTRI: I respectfully disagree, Your Honor.
25 Our position is that this issue does not arise until February

Cutri - Argument

21

1 8th of 2017 and I can show you how we get there --

2 THE COURT: Well, I read the briefs so I know how
3 you got there. But in April, '16 they proposed this
4 construction, right?

5 MR. CUTRI: And -- yes, if I can --

6 THE COURT: And then they withdrew it.

7 MR. CUTRI: No. We agreed to a construction on this
8 issue and I can show you what that -- that agreed construction
9 is where it happens on February 8th, 2017 and if I could, Your
10 Honor, can I direct -- can I bring this to your --

11 THE COURT: Sure.

12 MR. CUTRI: -- to the -- up to the Court?

13 THE COURT: Is this in your briefs?

14 MR. CUTRI: I believe it is. This is something that
15 they're relying on with respect to when they "dropped" it.

16 THE COURT: Okay.

17 MR. CUTRI: When they dropped it they say it was in
18 the joint claim construction.

19 THE COURT: I remember reading about the dropping.
20 I don't remember reading there was an agreed upon
21 construction.

22 MR. CUTRI: Well, I can show Your Honor that issue
23 here, and I'm handing up Docket 178 -- make sure I have the
24 exact --

25 (Pause in proceedings)

1 MR. CHRISTIE: Could you please advise me what page
2 you're talking about?

3 MR. CUTRI: So it's in -- here, I'll just give you
4 this copy. Here it is. And for the record, I'm on page 5 of
5 Docket 178. So, Your Honor, as you can see, the agreement
6 there is with respect to this term, and just to give Your
7 Honor a little bit of context --

8 THE COURT: Where should I look at?

9 MR. CUTRI: Oh, I'm sorry, Your Honor, on page 5 --
10 if you go back a page to page 4 so this is under Local Patent
11 Rule 4.3, construction of claim terms on which the parties
12 agree, and so the first column is the claim term and the
13 claims in it appears and the agreed upon construction -- it's
14 the third column.

15 And then if we turn the page, the second item, a
16 roof estimation module that is stored on the memory, and you
17 can see the parties have agreed to a construction here. And
18 so, Your Honor, there's the claim term -- well, there's the
19 claim term right in front of you, "a roof estimation module
20 that is stored on the memory."

21 So at the outset of this case, we're talking about
22 roof estimation software, that's what the case is about. We
23 say we've done our pre-filing investigation, we've looked at
24 your software, we think that you have a module that's running
25 on a memory. We can see it's on a computer, there is it.

1 What they proposed in April is well, we think that has to be a
2 single software module, and you can see it up there, that's
3 their construction -- "single" software module. We came back
4 to them and we said we disagree.

5 We had a number of discussions on it. Now we're in
6 the phase of claim construction where they have as you'll
7 recall I think almost 30 or 25 or a very large number of claim
8 terms, and we said, you know, we think we need to work in this
9 and see if we can come to an agreement, and we came to an
10 agreement with respect to this claim term.

11 Now, if you look at what they had in April they say
12 "a single software module which is stored in memory." What we
13 agreed on was "a module that is stored on the memory." That's
14 February of 2017.

15 Now, when you take that exchange and you couple it
16 with Your Honor's instructions to put everything out there,
17 don't keep anything in your pocket, we look at this and we say
18 well wait, they originally were saying a single software
19 module that is stored in memory.

20 Now we've agreed that a module is stored on "the"
21 memory, could they be continuing to argue that the entire
22 program has to be in one place, on one person's computer?
23 Could they be arguing that? They could be and so we should --
24 we don't want the risk of preclusion so we're going to put
25 this in, and then what we did after that, we had an exchange

1 with the defendants.

2 We said now, we've put this in under doctrine of
3 equivalents, but if you're no longer asserting the single --
4 the idea that everything has to be on one place, then we'll
5 drop it, we'll drop the doctrine of equivalents.

6 And they said no, you're right, we are still
7 asserting it and then at the bottom of this screen on slide 16
8 you can see that on July 26th they come back and they say
9 there is no single roof estimation module that is stored on
10 the memory.

11 That's one of their non-infringement positions. So
12 I know Your Honor said this is an amendment, how do we measure
13 good cause. First we start with the date on which we should
14 have reasonably been on notice that this could be the issue in
15 the case, that we needed to --

16 THE COURT: April, '16?

17 MR. CUTRI: Respectfully, Your Honor, if it was
18 April 16th (sic), I think we can establish diligence and lack
19 of prejudice, but I do believe that it's a fair argument to
20 say that it would have been when they -- when we agreed on
21 this issue --

22 THE COURT: They argued December, '15.

23 MR. CUTRI: They argued December 15th (sic) and we
24 obviously disagree with that.

25 THE COURT: Why?

1 MR. CUTRI: Because in -- December 15th there's no
2 way for -- everyone reading the claim understands that a roof
3 estimation module -- and if you read the patent, the memory is
4 always described as being distributed in the module, it can be
5 in many different places, so we would never have an occasion
6 at the outset of the case to say gosh, could they conceivably
7 argue that the entire -- you know, computer program is on one
8 -- you know, in one instance -- I'm sorry, in one computer in
9 one memory?

10 There's no way for us to know that until they
11 actually explicitly say this is what we're going for. And,
12 Your Honor, on the point of sufficiency of contentions, I
13 would invite the Court -- I'll find the docket record --
14 docket entry -- I would invite the Court to look at the
15 defendant's non-infringement positions.

16 As they were conveyed to us, they are essentially
17 repeating the claim language and saying it's not there,
18 without further explanation. So it is a two-way street in
19 terms of sufficiency of contentions but we were trying to in
20 earnest, Your Honor, getting this issue out and saying this is
21 the doctrine of equivalents. But with --

22 THE COURT: So let's get this straight, in April,
23 2016, you knew about this construction. Why then didn't you
24 move to amend to assert the DOE theory at or about that time?

25 MR. CUTRI: Because at that time, Your Honor, we

1 were still in negotiations with the plaintiff around this
2 issue and we were trying to explain to the plaintiff that we
3 didn't see a way that that would be supported by the case, and
4 we ultimately believed that we either -- we either agreed to
5 disagree or what we did in February of 2017 is it seemed to us
6 that there was a potential that the defendants were still
7 going to argue this issue, and it was at that point in
8 December -- I'm sorry, February, 2017 that we came to -- and
9 again, with Your Honor's instructions in May, we came to the
10 conservative decision that we should amend and include DOE --

11 THE COURT: So should --

12 MR. CUTRI: -- and so --

13 THE COURT: So should the Court find that you didn't
14 act diligently because if you had this doubt in your mind,
15 even after the February, '17 agreement, it still took a motion
16 and until June, '17 to assert the DOE theory for the first
17 time?

18 MR. CUTRI: And that -- let me address that issue,
19 Your Honor, because it's not until June -- I don't think we
20 count from February 8th all the way to June 6th, and I know
21 that looks like four months --

22 THE COURT: Why?

23 MR. CUTRI: Because first April was a stay because
24 we were working on settlement. You'll recall that we turned
25 the case off and there's -- so there's -- you subtract a month

1 from there. Second, you -- on February 8th your motion
2 practice was already in place with respect to amending
3 contentions, so we were already -- and I understand the
4 Court's position that we should have already amended but I --
5 February 7th when this issue crystalizes, we are --

6 THE COURT: They filed their motion.

7 MR. CUTRI: Yeah, they had already filed --

8 THE COURT: Right.

9 MR. CUTRI: -- their motion.

10 THE COURT: And you refused to amend.

11 MR. CUTRI: Your -- yeah, Your Honor, at that point
12 we believed that we -- including for reasons related to this
13 claim construction position, that we thought it was
14 appropriate to go in and take a deposition and ask a witness
15 does your system run on a -- on just the memory or does it not
16 run on memory.

17 And, Your Honor, we definitely understand the
18 Court's ruling, but that was in our mind as well and after
19 February as this is a perfect example of why we need a witness
20 because they have superior knowledge of how their system works
21 and so they're now agreeing to a claim construction with that
22 superior knowledge.

23 But, Your Honor, if we start from February 8th, the
24 briefing is already in place, we know that Your Honor is going
25 to resolve this issue of amending which we wanted to do. At

1 that time I believe the hearing had been scheduled for late
2 March -- I'd have to go back and look, but we would only be
3 talking about 45 days.

4 But then what happens is between February 8th and
5 May 1st, that's the time period we should be counting because
6 May 1st is when you resolved the issue of when are you going
7 to supplement, and then the timeliness of that supplement is
8 not in dispute after May 1st because that was an agreed date,
9 June 6th.

10 We got with the defendants and we said when -- when
11 we give this to you, can we have enough time to put everything
12 in, so if you're counting days from February 8th, you don't
13 count April and you stop at May, and so we're talking about an
14 order of two months.

15 And as you can see, we had to pull together the
16 doctrine of equivalents argument, pull together the relevant
17 evidence, and I think there are plenty of cases in this
18 district and elsewhere supporting that -- that diligence
19 during that time frame is sufficient.

20 And then I would have to address of course
21 prejudice, and we don't think there's any prejudice to the
22 defendants because as you can see, and we're not contesting
23 this, they are still in fact asserting this argument, the no
24 single roof estimation module stored on the memory.

25 We have not had -- they have not taken our technical

1 witness. Their expert reports are not due until February.

2 Their non-infringement reports are not due until February.

3 They have -- we have not taken their technical
4 witnesses yet, that's not due until -- we're not doing that
5 until October 24th. They have plenty of time -- I'm
6 explaining what the issues are in real time right now -- they
7 have plenty of time to prepare their witnesses.

8 The parties understand each other and if there -- if
9 there is an issue with respect to -- with respect to the
10 doctrine of equivalents and they say well, we don't -- they're
11 not saying that they don't understand, they do understand each
12 other and so we do believe that we've been diligent on this
13 issue.

14 And I think even if we had to go back to April to
15 the point we were talking about earlier, you'll recall when
16 the defendants were asking for Sungevity (phonetic) to be
17 brought into the case which they knew about for -- you know,
18 prior to the lawsuit, I think they actually knew about it
19 since 2014 when they tried to buy my client and did a review
20 of the patents, you know, their position was there was a lot
21 happening in the case.

22 And you can go back to that transcript and what
23 defense counsel says is it -- it kind of came to us as we were
24 looking at a number of different things a month or so ago, a
25 month or so before we moved, and I think on our side when we

1 put in our -- when we put in our amended infringement
2 contentions and proposed those to the other side and we had
3 that briefing in 2016 -- you can go back to that briefing --
4 they never say in that briefing that we don't understand your
5 positions or we need more. It's not until January that that
6 arises.

7 But I do think that if Your Honor is doing the
8 analysis around diligence and timeliness, I think we meet that
9 standard because we had a number of different things going on
10 including no fact depositions, an introduction of a new
11 accused product which the defendants did not disclose at the
12 outset of the case that we didn't get to add into the case
13 until November 4th.

14 And then we had the parties were negotiating on
15 claim construction and so I think we have sufficient diligence
16 even back since April.

17 We definitely have sufficient diligence from
18 February 8th to what we believe the right number is May 1st
19 because April, 2017 is not something that should be counted
20 against us because all the parties thought the case was going
21 to be resolved.

22 And then finally of course there's no prejudice to
23 the defendants at this point. They haven't identified
24 anything that -- that normally falls under the rubric of the
25 traditional analysis of prejudice under this Court's cases.

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1 THE COURT: Thank you, counsel. Last word --

2 MR. CHRISTIE: Yes, Your Honor --

3 THE COURT: -- defendant?

4 MR. CHRISTIE: -- if I may be heard briefly, Your
5 Honor, you got it right. This issue was front and center in
6 April, 2016. They knew about it, we discussed it.

7 If for some reason the Court finds that they were
8 not sufficiently on notice to raise it in December, 2015 as
9 they should have based upon the plain language of the claim, a
10 module that is stored on the memory -- "the" signifying
11 singular, I don't know what more you need in order to raise
12 that issue by way of infringement contention based upon the
13 plain language.

14 Separate and apart from that, Judge, Your Honor is
15 right, as of April, 2016 it was crystal clear that this was an
16 issue. We talked about it and yeah, we agreed to a
17 construction.

18 But that doesn't obviate or provide an excuse for or
19 to generate into good cause to allow them to amend. By virtue
20 of agreeing, we took an issue off the table for the Court to
21 address in the interest of compromise.

22 And, you know, now with that issue off the table by
23 way of claim construction, it's now a vulnerability or a
24 perceived strategic benefit for them to say ah ha, you know,
25 now that we've taken that issue off the table from a claim

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1 construction perspective, we can go out now and belatedly
2 raise these doctrine of equivalents --

3 THE COURT: Why? Why is it prejudicial?

4 MR. CHRISTIE: Because if they had -- they knew,
5 Judge, that we were -- we had taken this issue off the table
6 and --

7 THE COURT: Have you really taken it off the table?

8 MR. CHRISTIE: From a claim construction position,
9 yes, we have, Judge. From -- from a non-infringement
10 perspective, of course we reserve our right to argue all kinds
11 of different positions.

12 But -- but the main way in which we are prejudiced
13 here aside from the fact that it is much belated and after we
14 have been able to brief claim construction, do the expert
15 reports and as Your Honor knows, we have Markman next week,
16 you know, they have been able to delay and then at the end
17 dump, cram, try to include if all this new stuff after they
18 have the benefit of our strategic thinking on claim
19 construction issues. So --

20 THE COURT: Are you conceding that they didn't have
21 notice in December, '15 that they should have asserted this
22 theory?

23 MR. CHRISTIE: Well no, I'm not conceding that at
24 all. I'm basing it -- especially based upon the plain
25 language of the claim, even if the Court somehow finds that

1 they were not noticed at that time or should not necessarily
2 have been tasked with raising it at that time, it was
3 abundantly crystal clear by April, 2016.

4 And, you know, Mr. Cutri tries to dance on the head
5 of a pin by trying to carve out all this time here, there,
6 everywhere -- we were trying to settle the case, this, that
7 and the other thing.

8 But at the end of the day, Judge, diligence is
9 critical here as you know, and this is endemic of the
10 plaintiff's view of this case which is that they can delay and
11 delay despite repeated requests by us to supplement, provide
12 further detail.

13 And once -- generally it's only after court order
14 that they do that and, you know, then time has passed, time
15 has passed, time has passed, we have our claim construction
16 positions out, we have our claim construction briefing, our
17 expert reports, and then all the sudden, you know, with the
18 benefit of that strategic thinking, they dump all this stuff
19 on us.

20 THE COURT: Is it your position that you would not
21 have agreed it this claim construction in February of 2017 if
22 they had asserted the DOE theory earlier?

23 MR. CHRISTIE: I think that's correct, Judge. I
24 think that is correct because if we had known about the
25 infringement theory of the DOE, you know, we certainly would

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1 have given a lot more thought as to whether we would consent
2 to that construction.

3 THE COURT: Well, that's a little equivocal.

4 MR. CHRISTIE: Yeah --

5 THE COURT: I'm asking --

6 MR. CHRISTIE: -- I understand that and I'm
7 trying --

8 THE COURT: I want a fair answer. If the fair
9 answer is you don't know, that's fine. If it's yes, yes. If
10 it's no, no. I --

11 MR. CHRISTIE: I understand.

12 THE COURT: I just want to know what the -- what the
13 truth is.

14 MR. CHRISTIE: Of course. And I --

15 THE COURT: And if -- quite honestly, if you're not
16 in a position to say unequivocally that you would not have
17 agreed to that construction if they asserted the DOE theory, I
18 would like to know that.

19 MR. CHRISTIE: Okay. May I speak to my colleagues
20 and address that issue a little bit later today, Judge?

21 THE COURT: No --

22 MR. CHRISTIE: Okay.

23 THE COURT: -- I want to do it right now.

24 MR. CHRISTIE: All right.

25 (Pause in proceedings)

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1 MR. CHRISTIE: Judge, in answer to your question, we
2 would not have agreed to this construction absent if we had
3 not had the DOE theory in play. If the DOE theory hadn't been
4 in play, we would not have adopted and agreed to the
5 construction that we did agree to.

6 THE COURT: Okay. And are you prejudiced by that?

7 MR. CHRISTIE: We believe we are, Judge, because now
8 that we have -- we're locked in to this construction and after
9 the fact now they raise their DOE theory, you know,
10 admittedly, Judge, we haven't done an exhaustive analysis as
11 to the impact but, you know, we have -- we were handcuffed now
12 and we're unfairly prejudiced based upon our reasonable
13 reliance that they would not have raised the issue after the
14 fact because of our consent to the construction.

15 THE COURT: Okay, let's move on to the next issue
16 and that is the theories pursuant to 35 United States Code,
17 Section 271(f), (g) and, defendant, here's the question I have
18 for you. It's correct, isn't it, that you supplemented your
19 answers to interrogatories on May 5th, 2017?

20 MR. CHRISTIE: Yes, Judge, that's correct.

21 THE COURT: And it was in those -- that's the
22 supplement that the plaintiffs point to -- in my words, to put
23 them on notice about these foreign activities.

24 MR. CHRISTIE: That is correct, Judge.

25 THE COURT: Now, the information that you

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1 supplemented on May 5th, 2017, was that information available
2 to your client when they served their initial answers to
3 interrogatories say in February, 2016?

4 MR. CHRISTIE: I don't think that information was
5 fully available. Perhaps parts of it were, Judge, but --

6 THE COURT: Well let me ask you --

7 MR. CHRISTIE: Yes.

8 THE COURT: -- the information you supplemented in
9 May, '17 --

10 MR. CHRISTIE: Yes.

11 THE COURT: -- was that just where your company did
12 business?

13 MR. CHRISTIE: It's their -- their outsourcing --
14 international outsourcing outfits, yes, Judge.

15 THE COURT: Okay.

16 MR. CHRISTIE: But --

17 THE COURT: So why in the world wasn't that
18 available in February, 2016?

19 MR. CHRISTIE: Well, parts of it were. It wasn't --
20 it isn't a static relationship. It varied over time so it's
21 not necessarily remained consistent from day one to --

22 THE COURT: So how about I ask this question.

23 MR. CHRISTIE: Sure. I understand.

24 THE COURT: Was there foreign outsourcing in
25 February of 2016 that was not included in the February, 2016

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1 answers to interrogatories?

2 MR. CHRISTIE: Yes, there was certainly some of
3 that --

4 THE COURT: Okay.

5 MR. CHRISTIE: -- correct.

6 THE COURT: So why then did your client wait until
7 May, 2017 to supplement the answers?

8 MR. CHRISTIE: Okay, well we didn't -- we
9 supplemented the answers in 2017, you're correct, Judge --

10 THE COURT: May, 2017.

11 MR. CHRISTIE: You're right, Judge, in May --

12 THE COURT: Right.

13 MR. CHRISTIE: -- but what we also did in January of
14 2017 is we amended our non-infringement contentions to put
15 them squarely on notice about the foreign activities.

16 THE COURT: Squarely is your word, right?

17 MR. CHRISTIE: It is my word, yes.

18 THE COURT: Okay. But still tell me why you waited
19 until May, 2017 to supplement your answers to interrogatories
20 with information that was available a year and three to four
21 months before that.

22 MR. CHRISTIE: You're right, Judge.

23 THE COURT: And if I bar defendants from relying on
24 that supplement, am I then rewarding defendants for their
25 belated supplementation of their answers to interrogatories?

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1 MR. CHRISTIE: Okay, I don't think you're rewarding
2 us for any belated answers, Judge. I think the analysis here,
3 as Your Honor has acknowledged, is whether they were able or
4 should have raised these issues, whether it was
5 supplementation or amendment, and Your Honor has not quite
6 said how you feel about this but, you know, our view is that,
7 you know, clearly this is amendment --

8 THE COURT: But if they stand up --

9 MR. CHRISTIE: Yes.

10 THE COURT: -- and say, Judge, how could we not rely
11 on their sworn answers to interrogatories -- sworn answers to
12 interrogatories which only identified Utah -- what? I mean,
13 Judge, how could you penalize us for relying on their answers
14 to interrogatories?

15 MR. CHRISTIE: Right. Well, you're not penalizing
16 them, Judge, because while we may not have originally provided
17 the requisite level of detail that went to them in May, 2017,
18 they still had sufficient notice as of January, 2017 in our
19 non-infringement contentions that there was overseas
20 activities.

21 And of course by that time, as we said in our
22 briefs, we had given them, you know, 1,300-or-so documents to
23 that effect and being in the same industry in the same
24 business as we are, they also have overseas outsourcing.

25 THE COURT: So if I rule in your favor --

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1 MR. CHRISTIE: Yes, Judge.

2 THE COURT: -- on this one and say in effect that
3 plaintiffs can't rely on your answers to interrogatories, does
4 that incentivize parties to delay supplementing their answers
5 to interrogatories to provide accurate information?

6 MR. CHRISTIE: I don't think so, Judge, because --

7 THE COURT: But isn't that what happened here? You
8 waited over a year to provide information that should have
9 been provided in February, '16.

10 MR. CHRISTIE: Judge, in a perfect world we would
11 have all the knowledge and be able to provide it all at once.
12 As Your Honor acknowledges, this is a complex case involving a
13 lot of moving parts and --

14 THE COURT: I'm not sure you want to make that
15 argument because that's the argument plaintiffs are making
16 about why they didn't make fulsome infringement contentions --

17 MR. CHRISTIE: I understand, but --

18 THE COURT: -- in December, '15.

19 MR. CHRISTIE: I understand, Judge. But, you know,
20 when we're dealing with the infringement issues here, you
21 know, overseas activities, you know, may not have been on the
22 top of the list of things to nail down, and we had a lot of
23 interrogatories to respond to. We at the time provided the
24 requisite detail --

25 THE COURT: No excuse.

1 MR. CHRISTIE: I -- look, I understand, we could
2 always be better, we could always be more diligent. But I
3 think the critical point here is that they were on sufficient
4 notice as of January, 2017 on this issue and didn't do
5 anything about it. They could have moved and they should have
6 moved earlier to amend.

7 They had the documents that we produced to them,
8 they could easily have done key word searching, did not, and
9 now of course are raising it at the last minute to do so.
10 You're right, Judge, we could have been more detailed and
11 hindsight is 20/20 in many respects, but we did not of course
12 deliberately delay in producing this for any reason.

13 THE COURT: I'm not suggesting there was any bad
14 faith in no way, shape or form --

15 MR. CHRISTIE: Thank you.

16 THE COURT: -- but the facts are the facts.

17 MR. CHRISTIE: I understand what your perception is,
18 Judge.

19 THE COURT: So let's hear from the plaintiff on this
20 issue.

21 MR. CUTRI: Your Honor, I'll -- I'll be as brief as
22 I can because I think you've said what -- you know, I'm going
23 to say, which is we relied on their interrogatories. They
24 were -- in February, 2016 they said Utah. On May 9th -- it's
25 not May 5th actually it's May 9th, 2017 they amended. I will

1 say that I think I know why they did that is because on May
2 1st Your Honor said get all of your positions out on the
3 table, and you actually said if you go back to the transcript
4 -- I'm paraphrasing -- and that goes for defendants too.

5 And I think that they may have recognized that in
6 light of Your Honor's instructions, that was the appropriate
7 time to make a more fulsome disclosure of, you know, what you
8 see here on the screen, which is that the development, use and
9 testing activities are performed not just in Utah but in
10 additional locations.

11 So if we're going to do the amendment analysis, our
12 start date in this instance is May 9th and we finished on June
13 20 -- June 6th. I think that's 27 or 28 days and I think we
14 were extremely diligent. I will point out that there was a
15 large production that accompanied this interrogatory response.

16 That production included what they have acknowledged
17 are foreign use documents that we had to quickly evaluate and
18 incorporate into our infringement contentions. We did so,
19 there has been no argument with respect to prejudice and
20 there's none in the brief and there's none today.

21 THE COURT: Okay. Let's go to what I consider one
22 of the more difficult issues, the ground point -- and I don't
23 necessarily disagree that we can -- unless you disagree, that
24 we can deal with these three together, the ground point theory
25 under the 436 patent and the aero-triangulation theory issues

1 under the 436 and 153 patents.

2 MR. CHRISTIE: Yes, Judge, we agree with the Court
3 that all three of them can be combined in the same argument.
4 It's part and parcel of the same analysis. You know, this,
5 Judge, harks back to the impermissible amendment issue. In
6 the motion to compel, you know, they were trying to justify
7 and say, you know, we don't need to supplement, "it's all
8 there unambiguously."

9 And in their brief when they were describing how
10 unambiguously their constructions are with regard to this
11 correlate issue, you know, they made it crystal clear that it
12 involved the drawing -- correlation as to drawing of roof
13 features, and I'm flashing on the screen their brief in
14 opposition to the motion to compel, Docket 183 at page 10.

15 They're talking about matching up images and that's
16 what they're saying further down on the page. The screen
17 shots themselves unambiguously demonstrate infringement so
18 they don't need any further explanation because that's what it
19 means. But, you know, true to form, Judge, when we get their
20 second amended infringement contentions, it's a completely
21 different story.

22 Now we have what they have bullet-pointed out as
23 three separate and distinct correlation theories -- ground
24 point and aero-triangulation in addition to what they arguably
25 were referencing earlier which is the drawing -- the

1 correlation from the drawing of the roof features.

2 THE COURT: What do you say to their argument,
3 "Those are not new theories, but interrelated mechanisms used
4 by defendants to perform the claimed elements at issue in the
5 very same aspects of the same instrumentalities accused of
6 infringement all along."

7 MR. CHRISTIE: What I say to that, Judge, it is
8 lawyer argument which is not based upon any sound evidence and
9 moreover, it's incorrect. What they're trying to do is to say
10 well look, the feature was already there and it's all
11 interrelated stuff and you should have known that because we
12 were pointing to the correlation of the roof features from the
13 drawings that we included all this other functionality, and
14 that's nonsense, Judge.

15 They are required as you know to crystalize their
16 theories so we know what they claim is infringement. And more
17 importantly, Judge, and critically they point to this, and
18 this is slide 11 of defendant's, to show that this which was
19 in their infringement contentions -- again, the deficient
20 ones, the picture book ones that the Court and defendants had
21 issues with, this unambiguously shows the ground point theory
22 and the aero-triangulation theory. You know, Your Honor can
23 see it right there. There's no explanatory text at all.

24 THE COURT: So didn't they give you exactly what you
25 asked for? You asked for explanatory text and that's what

1 they gave you.

2 MR. CHRISTIE: It's a slippery slope, Judge. They
3 -- what they want to do is to say well, we gave you all the
4 detail you asked for so why are you complaining when in fact
5 they're trying to slip in new infringement theories. This is
6 not something that is from their perspective interrelated
7 functionality. These are --

8 THE COURT: That's what they said.

9 MR. CHRISTIE: They do but, you know, turning back
10 to the prior slide, you know, they themselves delineate this
11 as three distinct theories, and it is three distinct theories.
12 They're trying to gloss over that by saying oh, it's all part
13 of the same thing, it's all interrelated, Judge, you know,
14 don't look behind the curtain here.

15 But in fact, it is three theories requiring
16 different analyses and, you know, frankly again, something
17 happening after we've already crystalized our claim
18 construction positions, done the briefing, done the expert
19 reports, done the expert depositions.

20 Now we get sandbagged with this new nonsense after
21 the fact and again, Judge, if you look at this picture which
22 they say unambiguously discloses the aero-triangulation and
23 the ground point theory, I would be hard pressed to say how
24 the heck could you possibly figure that out. Two pictures
25 side by side of roofs, of buildings. There's no annotation,

1 there's nothing that delineates the fact that they're talking
2 about anything other than what they talk about earlier which
3 is correlation of the roof figures.

4 There's nothing to indicate at all that there's
5 discussion about ground points about aero-triangulation. It
6 doesn't exist. They're making it up out of whole cloth.
7 They're trying to shove things in at the last minute after we
8 have our claim construction positions crystalized and it's
9 unfair and prejudicial to us.

10 THE COURT: How is it prejudicial?

11 MR. CHRISTIE: Well because by now, Judge, we're
12 going to a Markman hearing next week before Judge Kugler and
13 they have now raised these new issues that we haven't had a
14 chance to address in claim construction, either briefing with
15 our experts or have expert depositions as to it --

16 THE COURT: Is this a claim construction issue?

17 MR. CHRISTIE: It does affect claim construction
18 because it affects the correlation -- one of the key claims
19 that's being construed is correlating two aerial images, and
20 this goes right to the heart of it with regard to the 436
21 patent, Judge.

22 MR. CUTRI: Thank you, Your Honor. I'm going to see
23 if I can convince my colleague to switch the projector over.
24 The defendants did ask that the plaintiff explain how
25 correlation occurs. That is exactly what they said in their

1 brief if we go to slide 11, and specifically on the claim --
2 on the correlation limitation.

3 "Plaintiff's" -- this is their brief, "Plaintiff's
4 failure to explain how the accused products meet this
5 correlate-the-first-aerial-image-with-the-second-aerial-image-
6 limitation makes it impossible for the defendants to
7 understand the plaintiff's infringement theory because later
8 limitations are based in the earlier correlation limitation."

9 "Likewise later limitations suffer from the same
10 deficiencies because plaintiffs do not explain how the screen
11 shots they copied and pasted are linked to or demonstrate
12 infringement of the corresponding claim limitations."

13 Now, you had asked how they respond to our assertion
14 that these are interrelated functionalities that are in the
15 accused products, and I'll take that in pieces. What we're
16 conveying to Your Honor is this is not a new accused
17 instrumentality, there's not another piece of software coming
18 in. There's not anything in the way of additional claims
19 coming in.

20 But the second point I would make is this is their
21 software. They have the guys who designed it at their
22 disposal. They can take any one of these claim -- any one of
23 these screen shots and put that in front of their defendant
24 witness -- their own witness and say what is going on in this
25 screen shot.

1 Now I'm going to show you what's going on, we're
2 going to have a -- if it's okay with the Court I'd like to
3 have a little bit of an explanation of what happens inside
4 their system because I think it goes directly to this issue.

5 If we go to the next slide, this is our infringement
6 contention, this is our amended contention providing the how
7 of the correlation. I'll start at the highlighted portion on
8 slide 12, the Property InSight mass production tool -- now
9 again, this is the tool that was just added in November,
10 that's what this relates to.

11 The Property InSight mass production tool correlates
12 two aerial images by at least correlating aerial images when
13 an operator selects ground points in each aerial image that
14 correspond to each other.

15 I'm going to skip number two because they don't have
16 an issue with number two. And number three, correlating
17 aerial images when an operator performs aero-triangulation and
18 selects three points in the aerial image that correspond to
19 each other.

20 And go to the next slide, this is the slide, this is
21 the screenshot that defendant's counsel just had up and saying
22 what is this, how could I possibly know what's going on. This
23 is a screenshot of their software. At the top -- and this is
24 what it looks like on the screen, you log into their software
25 -- they're the people who create the roof reports log in and

1 they can see two images. This is a house and you can see that
2 if you're looking at the orientation of the house there's a --
3 in that circle there's a blue car in the driveway and it's
4 facing south, right?

5 And then in the picture to the right the blue car is
6 facing north. If you're the operator the first thing you need
7 to do is relate these two images -- correlate these two images
8 to each other. There is a tool called the ground point tool.
9 They can ask their -- and I'm sure they did ask --

10 THE COURT: So why wasn't this all provided in
11 December, '15? What was your strategic reason for providing
12 incomplete contentions in December, '15?

13 MR. CUTRI: We did not have this software in
14 December, '15. This is software -- the mass production tool
15 is behind the curtain, so to speak. They -- they used this
16 software internally.

17 There is no way to get a hold of it and they did not
18 disclose it to us until late -- until the later part of 2016
19 at which point we prepared contentions and we put these ground
20 points -- we clicked on the ground point tool in this picture
21 and we provided it to them.

22 THE COURT: Why did you wait until June, 2017 to
23 provide this information?

24 MR. CUTRI: As you know, Your Honor, we had a -- we
25 had a view that we would like to talk to their witnesses, but

1 I'll tell you that with respect to that issue, when we get the
2 -- when we get the mass production tool in 2016, as you'll
3 recall, we moved to add it to the case and we put this
4 infringement contention in and they do not take issue with it.

5 So when they say we raised issues about this --
6 about these non-infringement contentions in April, that is
7 factually untrue because we did not --

8 THE COURT: The explanation wasn't there though, was
9 it?

10 MR. CUTRI: The explanation in when we submitted our
11 October, November -- you're talking about in October --

12 THE COURT: The explanation that was provided in
13 June, '17 that we're now arguing about, all the narrative,
14 that wasn't provided.

15 MR. CUTRI: In October of 2016? That's correct.
16 That's correct. I -- we understand that --

17 THE COURT: Why not?

18 MR. CUTRI: Because, Your Honor, at that time we had
19 the view that we -- we would like to -- what we were concerned
20 about at that time was putting a position out there and then
21 being in the opposite of where we are now, which is where we
22 took a guess at what we thought was going on --

23 THE COURT: I hope you learned a lesson from this.

24 MR. CUTRI: Absolutely, Your Honor, absolutely, and
25 as we understand the Court's procedures now I think -- I

1 think --

2 THE COURT: It's not just this Court --

3 MR. CUTRI: And I --

4 THE COURT: -- we're in New Jersey.

5 MR. CUTRI: Right. I think what we've learned now
6 is that --

7 THE COURT: Plus, I think every Court takes the same
8 position.

9 MR. CUTRI: I think what we've learned now, Your
10 Honor, is we had a -- we had a strange circumstance in this
11 case where we didn't have depositions. We were trying to be
12 conservative and make sure we wouldn't end up --

13 THE COURT: It happens in every case. It's the same
14 reason why you rolled into this Court and asserted 153 claim
15 terms when nobody could understand it, why you took that
16 position.

17 MR. CUTRI: Well, Your Honor, I -- I think we
18 reduced those claim terms ultimately, we did at Your Honor's
19 instruction and urging and we -- and we did do our best and I
20 think by the time that this issue arises in the fall of 2016
21 we did not hear from the defendants that this was an issue
22 that they didn't understand what was going on until January.

23 And I take the Court -- and we definitely understand
24 the Court's instructions now on this issue, but if we could, I
25 don't know whether Your Honor is viewing this as a

1 supplementation issue or an amendment issue but I'll take it
2 -- if it's a supplementation issue I think that the plaintiffs
3 are on -- the plaintiff is on solid ground because this is
4 additional detail that Your Honor said that we should provide
5 and the defendants asked for.

6 So if this is supplementation, I do believe that at
7 the beginning of the hearing Your Honor said that is what I
8 was asking you to provide, and if that's the case, I do think
9 that we succeed. I can take on amendment if Your Honor views
10 this as a different theory.

11 We do not view it as a different theory but if it
12 was an amendment, I think that the notice of when we had --
13 when they raised the issue of this is insufficient doesn't
14 arise until December when they say and by the way, the mass
15 production tool contentions that the Court just allowed and
16 that we did not raise an issue about sufficiency of, we do
17 have a concern with the sufficiency of it, that was not until
18 December of 2016.

19 And so and then we had the briefing practice, we had
20 the motion practice and we had the stay and it's on May 1st
21 that Your Honor resolves that issue and I do think there would
22 be diligence and there's no prejudice to them in this instance
23 by adding additional detail.

24 THE COURT: Thank you. Counsel?

25 MR. RUIZ: Your Honor, may I add one thing very

1 briefly? On the issue of whether it's a supplement, it is our
2 position as we understand it because we haven't had a
3 technical deposition yet that these are interrelated features
4 and that the two features that we are addressing require the
5 use of the first.

6 Once we get to talk to witnesses, we'll be able to
7 explore that, but they are all interrelated correlation and so
8 we do look at this as a supplementation of or accusation of
9 the correlation which we understood Your Honor to be -- if we
10 -- if it is a supplementation which we do believe it is
11 because they are all interrelated and that's what our
12 understanding is from looking at the documents, that that
13 would be permitted in accordance with the order that you
14 issued in May.

15 THE COURT: Thank you.

16 MR. RUIZ: Thank you, Your Honor.

17 MR. CHRISTIE: Your Honor, may I just briefly be
18 heard on a few points on this issue? Number one, it needs to
19 be made clear, Judge, that they have had access to our source
20 code and had their source code expert visit it regularly from
21 April through September, 2016. They easily could have
22 developed and raised this -- these two new theories when they
23 served their amended infringement contentions back in
24 September of 2016.

25 No question they deliberately waited and delayed in

1 doing that so their contention that it's our software and we
2 should have known what it does belies the fact that its their
3 burden with the information that we have produced to them to
4 do a requisite analysis which they did with their expert and
5 they did not -- and had ample opportunity to and did not
6 supplement by September, 2016.

7 They themselves as you saw identified these as three
8 separate theories and it's crystal clear that that is their
9 perception now --

10 THE COURT: Three separate --

11 MR. CHRISTIE: -- and they're trying to justify it
12 out.

13 THE COURT: -- interrelated theories.

14 MR. CHRISTIE: They're trying to justify after the
15 fact that this is all interrelated and it's one big happy
16 harmonious world, but again, it's three different theories as
17 you saw from our slide in which we said -- we showed that they
18 were nowhere -- that it was bullet -- bullet-pointed as three
19 distinct theories.

20 But more importantly, Judge, you know, I want to
21 take issue with what you see if you want the screen which is
22 their slide 13. This is ostensibly what they produced to us
23 by way of their infringement contentions at page 38, but
24 that's not accurate.

25 That supplementation with regard to the circles with

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1 the explanatory text was not there. And for the Court's
2 edification, I'll be happy to hand up what we received --

3 THE COURT: I'll take your word for it.

4 MR. CHRISTIE: This is page 38. There are no red
5 circles. There are no verbal annotations of any sort. It's
6 disingenuous for them to suggest that that is what we received
7 by way of their infringement contentions to show us about the
8 aero-triangulation and ground point theories.

9 It wasn't. It was two side by side images which
10 we've disclosed to the Court, and there was no way that we
11 were able to -- and as Your Honor found on May 1 with their
12 deficiencies, able to understand in any respect what they were
13 contending.

14 But we do know, Judge, what they said in their
15 motion to compel brief, and I'll hark back and finish with
16 that. In their motion to compel brief they said Judge, it's
17 there unambiguously, and what's there unambiguously is the
18 correlation of the roof drawing features.

19 That's what they put us on notice of, that was their
20 correlation theory. They set it forth clearly and succinctly
21 and now they're trying to expand it after the fact, after they
22 had access to our source code and didn't amend the
23 infringement contentions in September, 2016 which they easily
24 could have done. Thank you.

25 THE COURT: Okay. Going to the next issue which is

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1 the source code. Defendant, I just have a question or two.

2 MR. CHRISTIE: Yes, Judge.

3 THE COURT: I'm correct, aren't I, that your
4 position is that after May 1st, May 2nd, 2017 the plaintiffs
5 went back and looked for more -- looked at the source code
6 again --

7 MR. CHRISTIE: Yes.

8 THE COURT: -- and printed out 228 pages.

9 MR. CHRISTIE: Correct, 228 additional pages, yes.

10 THE COURT: And am I correct that it's your position
11 that you want to strike citations to any of the source code on
12 those 228 pages?

13 MR. CHRISTIE: That is correct, Judge.

14 THE COURT: The 228 pages that were printed between
15 May 11, 2017 and June 2nd, 2017, were they available when the
16 plaintiffs reviewed the source code from April 28th, 2016 to
17 August 5th, 2016?

18 MR. CHRISTIE: Unequivocally, yes.

19 THE COURT: That's -- those are the questions that I
20 had.

21 MR. CHRISTIE: And further to your point, Judge,
22 they already reviewed and spent significant time -- their
23 source code expert between April and September, 2016 reviewing
24 code, printing out -- they had already printed out 648 pages
25 so, you know, at the end of the day, they had already reviewed

1 and printed out a significant number of pages.

2 There was no need for them to go back and it is
3 unfortunately their lack of diligence in doing so, but to the
4 point, Judge, there's one slide we have I just want to draw
5 your attention to to show that starkness of what we were
6 dealing with. Their September, 2016 contentions, 463 pages,
7 958 citations, but only to their documents.

8 Then in June when they finally get religion and do
9 it their way, perhaps not the right way but their way, we are
10 inundated with a total of over 1,800 pages of contentions --
11 1,800 pages. And there's, you know, a number of citations to
12 their documents but for the first time --

13 THE COURT: So what happens to those 1,871 pages if
14 the Court grants your request to strike the citations to the
15 source code --

16 MR. CHRISTIE: Yes.

17 THE COURT: -- do they come out?

18 MR. CHRISTIE: I think they are -- I think they come
19 out of the case. I don't know that we necessarily have to
20 remove them physically, but they --

21 THE COURT: I mean, I guess what I'm asking is those
22 1,871 pages of contentions --

23 MR. CHRISTIE: Yes.

24 THE COURT: -- do they have any value if there's no
25 citations to source code in them?

1 MR. CHRISTIE: There's -- well, you know, I'm not
2 quite sure how they would view that and therefore answer the
3 question but our perception is that the additional citations
4 that they have raised, you know, largely deal with the
5 impermissible amendment.

6 THE COURT: Okay. But you're not -- you're not
7 seeking to strike the citations to the source code that were
8 produced before May 1st?

9 MR. CHRISTIE: We think it would be warranted but we
10 are not specifically seeking that -- that remedy from the
11 Court, correct.

12 THE COURT: Okay. Let's hear from plaintiffs. I
13 guess my question to you is, plaintiffs, to cut to the chase,
14 if these 228 pages of contentions that you printed after May
15 1st were important to your case, you had visited wherever the
16 source code was according to my count 27 separate times before
17 May 1st, so why couldn't you get these 228 pages earlier and
18 does that show lack of diligence? If they're so important to
19 cite in your June 27 supplement, why didn't you get them
20 before May 1st?

21 MR. CUTRI: So, Your Honor, we are citing everything
22 that we think may end up being relevant in this case with
23 respect to source code. I don't think it would be accurate to
24 describe this as everything that we know is important. Your
25 Honor's instruction at the last hearing was to put as much out

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1 there as possible and I think this is a supplementation
2 question rather than --

3 THE COURT: No, it's not.

4 MR. CUTRI: Oh.

5 THE COURT: No, it's not. I don't think it is --

6 MR. CUTRI: Okay, Your Honor --

7 THE COURT: -- because it's a supplementation
8 question as to a source code you already had in your
9 possession. I agree with that and defendants concede that so
10 we don't have to argue that point. But why should the Court
11 permit you to go back and take a redo because you served
12 inadequate contentions in December, of '16?

13 MR. CUTRI: So, Your Honor, I don't -- I think what
14 we -- the way we would view it is this is additional evidence
15 in support of existing theories --

16 THE COURT: So why didn't you get it before May 1st?

17 MR. CUTRI: Because we are trying to put everything
18 that's possible out --

19 THE COURT: Well, shouldn't you have done that
20 before May 1st?

21 MR. CUTRI: Well, Your Honor --

22 THE COURT: Does it take a Court to tell you to do
23 that?

24 MR. CUTRI: Your Honor, we understand that -- we
25 certainly understand that that's the preferred procedure now

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1 and we will -- and we will --

2 THE COURT: Did you not understand that when you
3 came into this case?

4 MR. CUTRI: Well, Your Honor, to be clear, we did
5 not want a --

6 THE COURT: You've got to be kidding me.

7 MR. CUTRI: To be --

8 THE COURT: You've got to be kidding me that you're
9 going to deny that.

10 MR. CUTRI: No, Your Honor, we understand that we
11 have an obligation to put our cards on the table --

12 THE COURT: In this patent world --

13 MR. CUTRI: -- as much as we can.

14 THE COURT: -- do you think you get redos?

15 MR. CUTRI: No, Your Honor, we don't, we don't. We
16 don't.

17 THE COURT: So let's not go there, counsel.

18 MR. CUTRI: No, and I -- I didn't mean to suggest
19 that we didn't understand Your Honor's position and the court
20 procedures --

21 THE COURT: I don't think --

22 MR. CUTRI: -- and I apologize.

23 THE COURT: -- you meant that because it's --

24 MR. CUTRI: I apologize for that.

25 THE COURT: -- it's just wrong.

1 MR. CUTRI: I apologize for that, Your Honor. What
2 we are trying to convey is when the defendants came to us and
3 when the defendants came to your Court -- came to Your Honor,
4 what they said is we want the additional detail that's in the
5 source code and anything that you may be relying on, you know,
6 potentially relying on put in there.

7 And so Your Honor's point about what would happen if
8 you were to grant this, one thing that could theoretically
9 happen is when we take the deposition of their source code --
10 the person who they designated on source code on October 24th
11 and 25th, Mr. Lewis (phonetic), if we put source code in front
12 of him that we either -- you know, whenever we printed it out
13 and he acknowledges at that point well no, that's not the
14 right source code, it's this other piece of source code, or if
15 he acknowledges that you have got the right source code or if
16 he says no, it's actually something else, then that is
17 potentially an issue. But I -- I can see Your Honor shaking
18 your head so I'm not going to go there --

19 THE COURT: It doesn't work like that, counsel.

20 MR. CUTRI: But --

21 THE COURT: You --

22 MR. CUTRI: -- Your Honor --

23 THE COURT: You were at wherever the source code was
24 27 separate days --

25 MR. CUTRI: Right.

1 THE COURT: -- 27 separate days. You had all the
2 opportunity in the world to get whatever source code you
3 wanted. Why should you get a redo? And if the Court grants
4 you the redo, am I incentivizing parties not to do a complete
5 search of the source code when they have an opportunity to do
6 it, that they should wait for the other side to file a motion
7 to compel and the Court says you supplement and then days
8 before the Markman hearing we have this uncertainty about
9 what's in and what's not in the case?

10 MR. CUTRI: Your Honor, I think if we're doing the
11 amendment analysis we start with diligence and we -- then we
12 look at prejudice, and I think that we were reasonably
13 diligent up until -- up until the time that we became on
14 notice that the -- you know, that we had to put everything in
15 and I -- and I think that, Your Honor -- I don't want to go
16 back to that, Your Honor, but to the point --

17 THE COURT: Don't go there, counsel, because you
18 cannot --

19 MR. CUTRI: Your Honor, let me --

20 THE COURT: -- you cannot stand there and say to
21 this Court that in this patent world you did not know that you
22 had to serve fulsome contentions, that you had to be diligent,
23 that you had to crystalize your theories early and the Court's
24 distaste for this "shifting sands" approach. You cannot stand
25 there and say that. You know that and I know that.

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1 MR. CUTRI: I agree, Your Honor, we're not -- we're
2 not saying that. We -- this source code is largely about the
3 mass production tool that was produced late so if we're going
4 to start with diligence, we would start when they produce that
5 I believe in the August time frame -- August of 2016.

6 And then the -- so when Mr. Christie said that we
7 had it since April, I don't think that's correct. I think we
8 did not get the mass production tool until later and we
9 started doing that as --

10 THE COURT: When do you say it was first available?

11 MR. CUTRI: I would have to go back and look. I
12 believe it was -- if it wasn't early August, it was the end of
13 July.

14 THE COURT: Approximately August, '16?

15 MR. CUTRI: Yes. And then we -- then we were
16 analyzing an entirely new product at that point. That was an
17 entirely new product. And by the way, Your Honor, it's --

18 THE COURT: So you waited from August, '16 to May,
19 2017 to start looking at this source code?

20 MR. CUTRI: No, we were -- we were looking at the
21 source code during that time frame and we prepared our
22 infringement contentions --

23 THE COURT: That wasn't on the logs.

24 MR. CUTRI: I believe that we -- after we got the
25 source code analyst analysis in advance -- I believe in

1 advance of adding the mass production tool, I think we did in
2 fact look at source code. I could go back and check but I
3 think --

4 THE COURT: Well, the exhibit is in the record. The
5 record shows that you, according to my count, looked at the
6 source code 27 times from April 28, 2016 to August 5th, 2016.
7 You didn't go back to review the source code until May 11th,
8 2017 to June 2nd, 2017 on six days, so there's a gap between
9 August 5th and May 11th.

10 MR. CUTRI: Right, Your Honor. So when we get the
11 source code I believe it might have been -- if it wasn't the
12 end of July, it might have been the middle of July, we
13 immediately went to the source code room and started analyzing
14 that so that we could put it in -- in our supplement that was
15 allowed in November.

16 And so our practice is to get the source code and to
17 try to -- you know, review it once it's been printed out and
18 we sent attorneys and an expert to go and do that and we
19 prepared supplemental contentions on that issue and we
20 provided them to the defendants.

21 They did not agree to that supplementation and it
22 was allowed -- ordered by the Court because it had been
23 produced late on November 4th, and so then the question
24 becomes when they raise the issue in December and they say,
25 you know, we still don't think you're sufficient and then from

1 there you can measure diligence according to what we talked
2 about previously.

3 We had, you know, additional document production, we
4 had claim construction that we were working on, we had the
5 joint claim construction statement that comes in in February,
6 we have a stay of the case and then we ultimately have Your
7 Honor's ruling and I believe date to put that in.

8 And I would add with respect to prejudice, I don't
9 think that there's been a showing of prejudice with respect to
10 any of the issues in this case. This is additional evidence
11 and what we understood the Court to be saying on May 1st is
12 that additional evidence should be added in so the case can be
13 decided on the merits, and that's what we were trying to do in
14 trying to get this evidence in on the merits.

15 And there hasn't been any assertion that because of
16 the source code, that they have any prejudice with respect to
17 claim construction for with understanding what our positions
18 are, they understand the source code and we've supplied it and
19 so we don't think that -- we don't think there's been any
20 showing of prejudice at this --

21 THE COURT: Isn't the law that I don't get to the
22 prejudice analysis unless a party satisfies the diligence
23 prong?

24 MR. CUTRI: I believe that is stated in some of Your
25 Honor's cases, yes.

1 THE COURT: Okay. Thank you. All right, let's move
2 on to the next issue, the priority date -- invention date and
3 I have a couple of questions here that hopefully will clarify
4 it because I think we can divide this up. First dealing with
5 the priority date issue, defendant, is there any priority date
6 issue other than the fact that you're alleging that they can't
7 assert alternative dates?

8 MR. CHRISTIE: Yeah, just let me be clear if it's
9 not entirely clear. They, under Federal Circuit law,
10 unfortunately are permitted to assert alternative dates for
11 priority. The gravamen of the problem with us is the shifting
12 sands issue which Your Honor has acknowledged. They vacillate
13 back and forth. Initially in December --

14 THE COURT: No, before we get there --

15 MR. CHRISTIE: Okay.

16 THE COURT: -- I just want to know if that's the
17 only priority date issue. On the invention dates --

18 MR. CHRISTIE: Yes.

19 THE COURT: -- you're saying they changed them. Are
20 you on the priority date issue --

21 MR. CHRISTIE: Yes.

22 THE COURT: -- are we only dealing with this
23 alternative date issue? Is that the only issue we have to
24 deal with with regard to the priority date?

25 MR. CHRISTIE: Not entirely, Judge. I'll set forth

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1 in a few sentences the issue. The issue is that they have
2 also vacillated and changed their position on priority dates.
3 They start off in December of 2017 with an alternative --
4 April, 2017 -- I'm sorry, April, 2007 or April, 2008.

5 THE COURT: Right.

6 MR. CHRISTIE: But critically in September, 2016
7 when they amended, they picked April, 2007. April, 2007 is
8 the priority date, unequivocal, no alternative, that's it.
9 Then --

10 THE COURT: Am I --

11 MR. CHRISTIE: Sorry.

12 THE COURT: Sorry, I don't mean to interrupt because
13 I want to get to the crux of this, I thought from plaintiff's
14 papers they were taking the position that this never changed,
15 that it was the same dates, 2007, 2008 in their preliminary
16 infringement contentions, their first amended or supplemental
17 contentions and their second amended contentions, are you
18 denying that that's in fact the case?

19 MR. CHRISTIE: I'm saying that that's not entirely
20 accurate. What I'm saying is that their position on priority
21 dates has not remained the same in each of their three efforts
22 at --

23 THE COURT: That's not what they say though.

24 MR. CHRISTIE: Okay, I understand that and that's --

25 THE COURT: Am I right, plaintiffs?

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1 MR. RUIZ: Yeah, it --

2 THE COURT: Do you say it hasn't changed?

3 MR. RUIZ: -- it hasn't changed.

4 THE COURT: Okay.

5 MR. CHRISTIE: Okay, and I'll put it quickly in a
6 nutshell, Judge.

7 (Transcriber change)

8 THE COURT: Where -- well, what are you relying on
9 to say that there was one date that's different from the
10 preliminary infringement contentions?

11 MR. CHRISTIE: Judge, specifically with regard to
12 their response to Interrogatory number 7, which we had to
13 fight them on as you know, you know, we first -- initially, in
14 their December 2015 contentions they said "priorities in the
15 alternative." It's at least as early as April 2007, you know,
16 but it could be April 2008.

17 However, I'm looking at the issue with regard to
18 their first amended, which was in September 2016, and they are
19 referencing, it's not equivocal, it's April 2007.

20 THE COURT: September 17? I'm sorry, September --

21 MR. CHRISTIE: Their September 2016 first amendment.

22 THE COURT: What exhibit is that?

23 MR. CHRISTIE: It is Exhibit 14 at -- at 3, Judge.

24 THE COURT: Let's take a look.

25 MR. CHRISTIE: Sure.

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1 THE COURT: Oh, you're referring to the answers to
2 interrogatories?

3 MR. CUTRI: Yes.

4 THE COURT: Okay. The invention was reduced to
5 practice at least as early as April 17, 2007; is that what
6 you're relying on?

7 MR. CUTRI: Correct, Judge. Yes.

8 THE COURT: Okay.

9 MR. CHRISTIE: And then --

10 THE COURT: But do you acknowledge their contentions
11 didn't change?

12 MR. CHRISTIE: Acknowledge that their contentions
13 didn't change. Just like you've taken us to task with regard
14 to the sufficiency of our interrogatory responses, Judge, you
15 know, their interrogatory responses tell a story. They were
16 under oath. They were required to tell us what their priority
17 dates were, and they said April 2007.

18 THE COURT: But I have a feeling -- I could be wrong
19 -- that when they stand up, they're going to say that all we
20 were saying was it was at least as early as April 17, 2007.
21 We were not excluding 2008. I have a feeling they may argue
22 that.

23 MR. CHRISTIE: That may well be what they argue,
24 Judge, but, again, you know, as Your Honor has acknowledged
25 with regard to an earlier issue in this argument, you know, we

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1 asked for their earliest priority date by way of the
2 interrogatory. We had to fight them to get it.

3 THE COURT: You got it.

4 MR. CHRISTIE: Right.

5 THE COURT: April 17, 2007.

6 MR. CHRISTIE: But -- but they say at least as
7 early. You know, maybe it's earlier than that, right? How
8 are we to know, Judge?

9 THE COURT: Well, I guess that's what depositions
10 are for.

11 MR. CHRISTIE: Understood.

12 THE COURT: That's why you get the hourly fees you
13 get, because you had answers like that.

14 MR. CHRISTIE: Thank you, Judge. So I guess our
15 larger point is they have not been consistent on that issue
16 with regard to their representations and their contentions and
17 in their sworn interrogatories, as we know from our efforts to
18 fight them to get a final response as to interrogatory number
19 7. So to the extent that it was not clear, that is the issue
20 with regard to priority dates, Judge.

21 THE COURT: All right. Let's go to invention.

22 MR. CHRISTIE: Yes.

23 THE COURT: I understand -- I understood your
24 position to be that plaintiff is asserting new invention dates
25 for all seven patents?

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1 MR. CHRISTIE: Yes, that is correct.

2 THE COURT: Yes. I think the plaintiff says that's
3 incorrect, so we'll have to get that straightened out. All
4 right? What is the change in plaintiff's conception story and
5 reduction to practice story that you allege was made?

6 MR. CHRISTIE: Let me turn your attention to slide
7 25, Judge. We've, you know, been trying to get from them this
8 issue of the invention date, the reduction to practice and
9 conception dates. And, you know, it's been like pulling
10 teeth, unfortunately. We -- they were required --

11 THE COURT: Well, you got it now.

12 MR. CHRISTIE: Yes, Judge, we did get it now. But
13 again, you know, under the local rules, as Your Honor knows,
14 they're required to give us this information up front.

15 THE COURT: Yes, indeed.

16 MR. CHRISTIE: And they didn't. And they were
17 hiding the ball and not being responsive, and, you know,
18 finally, when pressed, we had to threaten to move to compel in
19 order to get this information, no less, Judge.

20 THE COURT: Can I predict they're going to disagree
21 with you?

22 MR. CHRISTIE: You can -- your predictions are
23 generally prescient, Judge, and they may well say that, but,
24 you know -- and then they had to go on their -- their
25 expedition to figure out what their invention dates are by

1 going to various unknown third parties. They --

2 THE COURT: Question for you. Is it your -- I guess
3 I should have asked this. I'm going to ask them, too. Is it
4 your position that if you're going to change an invention
5 date, you must do it by a motion to amend contentions rather
6 than supplementing interrogatories?

7 MR. CHRISTIE: Yes.

8 THE COURT: Do you agree or disagree with that,
9 plaintiffs?

10 MR. CUTRI: We disagree with that, Your Honor, for
11 conception reduction to practice dates as distinguished from
12 priority dates.

13 THE COURT: Got it.

14 MR. CHRISTIE: So the point, Judge, is that not only
15 do we have the local rules in our corner, but we had, as you
16 know, a specific interrogatory, you know, saying what is your
17 earliest conception and reduction to practice date. And they
18 -- they fought us on it, fought us on it, fought us on it,
19 and, you know, ultimately we -- we had to threaten to move to
20 compel in September 2016.

21 And, you know, then, of course, the Sungevity issue
22 comes up. So what this is, Judge, is a transparent effort by
23 them to try and address this Sungevity reference, which is now
24 part of the case, by back-pedaling and scrambling in order to
25 try and come out from under that reference because --

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1 THE COURT: Well, let's assume that's true --

2 MR. CHRISTIE: Yes.

3 THE COURT: -- just for the sake of argument.

4 MR. CHRISTIE: Yes.

5 THE COURT: Didn't this Court say when that
6 amendment was granted that the Court was not going to let
7 plaintiffs be prejudiced by that amendment?

8 MR. CHRISTIE: You're absolutely right, Judge. And
9 you know what, they weren't prejudiced by that amendment. And
10 the reason we know that is because they take issue with the
11 fact time and again that the Sungevity reference is indicated
12 on the face of each of the asserted patents, and that we,
13 defendants, should then therefore have known about it.

14 Well, Judge, what about them? It's on their
15 patents. It's on the face of each of their asserted patents.
16 They knew about it when they were prosecuting those patents.
17 For them to point the finger at us in that regard is
18 ridiculous. Of course they knew, and there was no prejudice.

19 THE COURT: It just shows to go you that depending
20 on whose ox is being gored, right?

21 MR. CHRISTIE: Indeed, Judge. There are a lot of
22 oxes being gored.

23 THE COURT: That affects what position you take in
24 the case, right?

25 MR. CHRISTIE: That is absolutely true. So there's

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1 absolutely no prejudice, as they themselves acknowledge.
2 Their face of their patents reference this -- this Sungevity.
3 They knew about it. They had to argue over it in order to get
4 the 436 patent allowed. So, you know, there is no prejudice.
5 Therefore, they knew about it, and their efforts here are an
6 effort now, oh -- oh, no, defendants figured out Sungevity,
7 now we're really in trouble. We got to do something. We got
8 to scramble. And that's what this is all about. They're
9 trying to scramble --

10 THE COURT: So what are you saying? The Court
11 said --

12 MR. CHRISTIE: Yes.

13 THE COURT: -- I'm going to permit the amendment,
14 but I'm not going to let plaintiffs be prejudiced by it.

15 MR. CHRISTIE: Right.

16 THE COURT: Are you saying, what, that they asserted
17 this too late? Is that what your argument is?

18 MR. CHRISTIE: I'm saying that what they are now
19 trying to do, with Sungevity in the picture, is scramble to
20 change their invention dates when they knew all about
21 Sungevity years earlier, and so that there is no prejudice to
22 them.

23 THE COURT: But it wasn't in the case.

24 MR. CHRISTIE: It was not in the case.

25 THE COURT: Okay.

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1 MR. CHRISTIE: Only by virtue of the fact that we
2 hadn't picked up on it quite yet.

3 THE COURT: Okay. So it wasn't in the case?

4 MR. CHRISTIE: Yes.

5 THE COURT: And now it's in the case?

6 MR. CHRISTIE: Yes.

7 THE COURT: And the Court said, now it's in the
8 case, plaintiffs, I'm not going to let you be prejudiced. Why
9 shouldn't I let them supplement or amend if it's their
10 position that they're changing something, which I don't think
11 they're going to say they are, because of the Sungevity
12 reference being included in the case?

13 MR. CHRISTIE: I mean, I guess it comes down to,
14 Judge, what we have in the slide. We're dealing with their
15 inventor notebooks. And their inventor notebooks are clear.
16 You know, they had an opportunity to address this issue by way
17 of local rule deadlines and requirements. They didn't.
18 They've added all this new material. They professed that they
19 had to go on a third-party fishing expedition to figure out
20 when their invention dates were. You know, it's ludicrous for
21 them to say, oh, two years after we filed suit we're still
22 trying to figure out the invention dates. Nonsense. Your
23 Honor knows this is stuff that should happen up front and be
24 produced early with regard to the local rules.

25 THE COURT: And the prejudice to defendants is what,

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1 because you did your prior art search already?

2 MR. CHRISTIE: We did our prior art search, we found
3 the Sungevity reference. It's right on point. They're
4 nervous about, and they are trying to swear behind it and to
5 get -- get out from under it.

6 THE COURT: So now you're going to have to do if --
7 if, capital I, capital F, IF the Court permits the
8 supplement/amendment to go forward on the invention dates,
9 what, you're going to have to do a new prior art search?

10 MR. CHRISTIE: We're going to have to do a new prior
11 art search, and, you know, it may, you know, negatively affect
12 our positions on some of our non-infringement contentions that
13 we would have to take a look at.

14 THE COURT: That's the prejudice, you're going to do
15 a new prior art search?

16 MR. CHRISTIE: Among other things, Judge. But
17 again, the point is also the timing. This is a week before
18 the Markman hearing. They're, you know, raising this issue,
19 supplementing, supplementing, supplementing, giving more and
20 more information to us in July. We're -- we're having the
21 hearing now and trying to resolve this issue a week before the
22 Markman hearing. And, you know, then we're thrust to the
23 wolves with regard to Markman arguments, when they knew this
24 information earlier. They could have raised it earlier.

25 Sungevity was within their -- their sights years

1 earlier, and, you know, the invention dates are what they are.
2 They keep changing them, Judge. They keep making these new
3 modifications and revisions, and it's patently obvious as to
4 why they're doing it. It's because of Sungevity. They're
5 scrambling, they're nervous, and it's inuring to our
6 detriment. We had reasonable reliance upon, you know, the
7 earlier invention dates, and now they're trying to scramble us
8 and make us have a different -- take a different position and
9 affect theories of the case, and it's improper and --

10 THE COURT: Where do I look --

11 MR. CHRISTIE: Yes.

12 THE COURT: -- to substantiate your contention that
13 they changed the invention dates?

14 MR. CHRISTIE: Well, Judge, we -- there was -- as
15 you can see from the slide that's on the screen, there were
16 two supplemental revisions, July 12 and July 19 of this year.
17 There was a --

18 THE COURT: There's no question that there was a
19 change between July 12 and July 19th; understood.

20 MR. CHRISTIE: They added -- they added some -- some
21 additional -- right.

22 THE COURT: Okay. So --

23 MR. CHRISTIE: And --

24 THE COURT: -- let's take July -- what is listed
25 before that they -- in your view they changed? Interrogatory

1 number 7, the answer?

2 MR. CHRISTIE: It's -- right. Right. You know, by
3 default we can look to interrogatory number 7. They had --
4 you know, we kept pressing them for a response. They agreed
5 -- if you can look at the bottom of slide 24, you know, they
6 finally agreed in September of 2016, fine, you know, you've
7 battered us enough, we'll finally supplement interrogatory
8 number 7.

9 And then the Sungevity issue came up and that threw
10 them into a tailspin. And, you know, it's -- you know, then
11 they're scrambling to try and finally honor the commitment to
12 supplement and, you know, address the Sungevity issue in the
13 process.

14 So, you know, what they're doing is they're changing
15 the reduction to practice dates and professing that they
16 didn't know about this. You know, this is basic concept,
17 Judge, you know that, patent cases. You should know this when
18 you file suit, when was the reduction to practice, when was
19 the conception of your claimed inventions. And, you know, for
20 them two years after the fact to still not know and have to go
21 out on a -- an expedition involving talking to third parties,
22 you know, smacks of lack of due diligence. Thank you.

23 THE COURT: Real quickly, plaintiffs, on the
24 invention date issue.

25 MR. CUTRI: Your Honor, Mr. Alper is going to

1 address this issue as to --

2 MR. ALPER: I'm going to address the invention date
3 issue, and Mr. Brown can answer any questions on the priority
4 date issue. I'm happy to proceed on invention dates if you'd
5 like.

6 So there are a couple of issues that I'd like to
7 address, Your Honor. The first is whether we made a change,
8 and then what that -- the impact of that is on local rule
9 compliance and supplementation of interrogatory. And then,
10 lastly, to address how that relates to the addition of
11 Sungevity and what happened at our hearing in May.

12 So, first of all, we have not changed dates. The --
13 we made a production of documents in December 2015. It was
14 actually before they served their interrogatory on us. And
15 that involved conception documents per the local Rule 3.2(b)
16 that occurred prior to the priority date or the application
17 date, whichever is earlier. And those are still materials
18 that we are relying on to pinpoint the conception --
19 conception dates -- invention date, excuse me, for the patent.

20 In September of 2016, by an agreement that counsel
21 just showed you was filed with the Court, we supplemented our
22 interrogatory response to -- I'm sorry, let me start one step
23 back. Initially we referred by Federal Rule of Civil
24 Procedure 33(d) to the documents that we had produced
25 regarding conception reduction to practice. By agreement of

1 the parties we were asked to provide a supplemental response
2 to that interrogatory and we did.

3 And at that point we said that the -- the -- we've
4 been using the 436 patent as representative. I think both
5 parties in the briefing using the 436 patent as representative
6 of the other responses. I will for purposes of my discussion
7 here. At that point we said that the conception occurred in
8 the second half of 2006 and we -- because the interrogatory
9 asked for the earliest conception reduction to practice date
10 we identified the April 2007 date, which was a constructive
11 reduction to practice at that early date.

12 And, then we cited documents that related to those
13 topics and also diligence. Those are -- we are not changing
14 from those dates. When it came to -- after Sungevity was
15 allowed in the case, we first provided our local rule in our
16 validity contentions in response to Sungevity, where we
17 explained that one of our responses was going to be on which
18 came first.

19 And, then in response to further correspondence from
20 the plain -- defendants, excuse me, we provided these further
21 supplements in July on the interrogatories related to
22 invention dates. And, I want to be very clear what we did
23 there so Your Honor can evaluate it, because we didn't change
24 the dates in the way that they are suggesting.

25 So in the July 2017 supplements, which by the way,

1 they came after Sungevity so I'm not going to say it's only
2 because they were just asking us to put more detail in place.
3 They obviously wanted more detail. We obviously had Sungevity
4 in view.

5 But we did a couple things. If you recall I said we
6 previously said that conception occurred in the second half of
7 2016. They asked for a specific date, we gave them a specific
8 date. It related to a notebook that we had produced in
9 December 2015. It's in the notebook. I can show you the
10 slide of the notebook pages and so forth.

11 So we picked a particular date within the range that
12 we had previously provided them on that. We then, in response
13 to their request, gave additional details about the story of
14 diligence, essentially like what happened along the way. We
15 are -- we have never changed our reduction -- that earliest
16 reduction to practice date, although in connection with
17 providing more of the story, we identified a January 2008
18 date, which is later in time, as the time that the product was
19 first final -- shipped, basically, finalized and shipped, and
20 we put that in there.

21 Now, the interrogatory itself doesn't call for that
22 date because it only asked for the earliest date that we're
23 claiming. But in response to their request, for obvious
24 reasons we wanted to put -- you know, put that in there. That
25 date is derived from materials that were produced back in

1 December of 2015 in accordance with our local rule
2 obligations. And, it was something that was -- those
3 materials were acknowledged in other circumstances in this
4 case over the course of 2016, including the Section 101
5 invalidity motion to dismiss that was evaluated back in March
6 2016.

7 In any event, to this day we are still claiming the
8 same conception date, although we pinpointed it within that
9 range, and we are claiming the same constructive reduction to
10 practice date, and then we've given an even later actual
11 reduction to practice date. So you might ask, what in July,
12 other than filling in additional details, was new. And, I
13 want to be very clear about that as well, Your Honor, unless
14 -- I can provide that additional detail if you'd like.

15 We, subsequent to Sungevity being allowed in the
16 case, we went back and looked to make sure whether there is
17 additional diligence materials. By and large, these are all
18 in 2008 and are after the earlier -- the dates that you'd be
19 producing materials for under the local rules, because those
20 are -- the local rules regard materials prior to the priority
21 date or the application date, whichever is earlier.

22 And, so there are some additional diligence
23 materials and then there is a small amount of source code
24 files that the company and the inventor did not think were in
25 existence anymore at the time that we made the original

1 collection that show our additional corroboration to some of
2 the conception.

3 THE COURT: Good question. Is this source code the
4 initial source code you obtained or the subsequent 228 pages?

5 MR. ALPER: This is separate. This would be Eagle
6 View's or source code that the inventor had that --
7 we're talking about that's Xactware source code so this is
8 separate. Does that make sense, Your Honor?

9 THE COURT: Yes, I got it.

10 MR. ALPER: Okay. And, so the real change, if you
11 will, Your Honor, is the addition of references and the
12 production of these additional diligence materials and this
13 small amount of additional source code which corroborates the
14 conception dates and of course the notebooks and so forth.

15 And, so we -- so where does that leave us? And,
16 I'll just sum it up.

17 THE COURT: In your view this is a supplement not an
18 amendment?

19 MR. ALPER: Yes. And, so that's what I'll get to
20 right. I'll sum it all up. So, we are not changing our
21 dates. We disagree with that. And, secondly, the things that
22 we are adding are by the way of supplement. They weren't
23 called for by the local rule and we are just focusing on the
24 interrogatory at this point.

25 And, given -- there's two things I want to say about

1 that. Given the nature of these materials they are in the
2 form of a supplement because they are filling in additional --
3 they are supplemental to the, you know, our, what would
4 ultimately be, you could call, our contentions on invention
5 dates, right. That's what we put in the interrogatories that
6 asked for that. We filled that in.

7 And, they are particularly appropriate given -- this
8 is where I get to the Sungevity situation because as Your
9 Honor noted a moment ago, in order to -- a very important
10 argument to defendants in introducing Sungevity was that by
11 doing it we would have an opportunity -- a full opportunity to
12 respond. You know, of course Your Honor acknowledged that in
13 your order.

14 And, there is something very important about
15 Sungevity that I want to note and then we can evaluate whether
16 this is an acceptable response. And, that is, the defendants
17 contend that Sungevity is essentially identical to at least
18 some or one of the patents in suit. But the reason for that
19 is they -- is that when Sungevity was prosecuted they actually
20 saw the Eagle View patents and copied the claims from the
21 Eagle View patents.

22 So according to defendants, whether these things
23 have the same disclosure rights, Sungevity as prior art and
24 the 436 claims is a fait accompli. It's a decided issue
25 because they are similar in that regard. And, so when -- a

1 primary issue when it comes to Sungevity is going to be who is
2 first between Sungevity and the Eagle View patents. And, so
3 when defendants are saying back a number of months ago that
4 we'll have a full opportunity to respond, that's the primary
5 response and so we think it would be very unfair at this point
6 and we will be highly prejudiced if we weren't able to make
7 that response.

8 All of that, of course, assumes that we are making a
9 change which we really aren't.

10 Thank you.

11 THE COURT: Counsel, if you're going to be more than
12 a minute or two, I just have to take a brief break to do
13 something.

14 COUNSEL: Oh, yes, sure. Do you mind if we take a
15 break Judge and --

16 THE COURT: Yes, let's take a -- I have to take a
17 short break and then I'll be back and we'll finish up.

18 COUNSEL: Thank you.

19 (Recess at 3:58 to 4:29 p.m.)

20 COURTROOM DEPUTY: All rise.

21 THE COURT: Back on the record. I think, defendant,
22 we're up to you.

23 MR. ALPER: Your Honor, I'm sorry to interrupt.
24 Just one thing that I realized over the break that I hadn't
25 addressed, if I may for 30 seconds. You asked a question of

1 defendants about prejudice to them, and defendants said that
2 they would have to do a new invalidity search and then said
3 the timing of it all, I think I have in my notes. But just
4 very briefly, as I said, we haven't changed our dates and so
5 we don't think that there would be prejudice, but I think the
6 important thing that we -- I wanted to put out there is they
7 have other prior art in the case, and you probably saw this in
8 our briefing, that all the rest of the prior art is earlier,
9 and it's so early that it avoids any issue with respect to the
10 invention date.

11 So the prior art they were previously relying on and
12 have been relying on for the entirety of the case and clearly
13 was the subject of searches --

14 THE COURT: So they don't have to do another search.

15 MR. ALPER: That's my point. Thank you, Your Honor.

16 THE COURT: See he -- plaintiff said you don't have
17 to do anymore searching defendant.

18 MR. CHRISTIE: Well, it's wonderful that he's
19 directing how we can conduct our validity strategy and perhaps
20 I should have consulted him earlier, but I think we beg to
21 differ.

22 THE COURT: Now, now, now.

23 MR. CHRISTIE: I know. I'm sorry, Judge, it's late,
24 but thank you for being accommodating. You've spent a lot of
25 time with us and I will try to be brief because you've

1 indulged us.

2 A couple key points, Judge. Number one, there has
3 been changes in the reduction to practice dates. I won't
4 belabor it but I will point Your Honor to Exhibit 11, which is
5 the second supplemental response to interrogatory number 7,
6 which is a whopping 65 pages.

7 Without going into excruciating detail, you know,
8 please take a look at that.

9 THE COURT: This was served what date?

10 MR. CHRISTIE: It was July 12, 2017, Judge. That
11 will dictate and show you that there has been changes in the
12 production to practice dates. But, you know, the points that
13 I quickly want to make are, the issue is two sided here.
14 Local rule based as well as interrogatory based.

15 Your Honor is intimately aware of the local rules
16 and the requirement that we need to give invention dates and
17 the accompanying documents early. It clearly never happened.

18 The point that we're dealing with now with Sungevity
19 is they're trying to hide behind Sungevity and say, oh, Judge,
20 now that Sungevity has been added to the case, you know, we
21 need to do all this new stuff. But, again, they knew about
22 Sungevity when they were prosecuting their patents. It's on
23 the face of all their patents. Sungevity is a smoke screen
24 that they are hiding behind to try to cramp all this new stuff
25 in earlier that they should have put in in December of 2015

1 under the local rules as they're required to do.

2 Separate and apart from the failure to comply with
3 the local rules, Judge, I pointed Your Honor to Exhibit 11,
4 which is the second supplemental response, Interrogatory 7,
5 which demonstrates that under our interrogatory which asks for
6 the earliest of the reduction to practice and conception
7 dates, we still get different dates over time. And, it's
8 clear there and I won't belabor that.

9 But the point is that also in July of 2017 when we
10 are getting these new responses to interrogatories, we're
11 getting additional documents, and not just a few documents,
12 Judge, we're getting 2000 documents, 2000 pages of documents,
13 let me be clearer.

14 Again, this is not Sungevity related. This is not
15 arising from Sungevity, it has nothing to do with Sungevity.
16 It's the quintessential issue with regard to patent cases as
17 Your Honor knows. When was reduction to practice? When was
18 conception of your invention, something that most plaintiffs
19 know before they file suit and therefore can provide in their
20 first attempt at complying with the local rules and in their
21 contentions.

22 So, they're salting the record now with these 2000
23 plus new pages of documents which they should have provided
24 early on, they did not. And, again, what it is doing Judge,
25 is incentivizing as Your Honor has mentioned periodically

1 throughout the day, incentivizing a party from holding back
2 having information at their disposal, waiting, waiting,
3 waiting, and then all of a sudden trying to cram it in at the
4 last minute.

5 It is a consistent pattern unfortunately that we've
6 been dealing with on that issue and it pervades this issue as
7 well with the regard to the priority and reduction to practice
8 dates.

9 You know, plaintiff claims that they are prejudiced.
10 Judge, we're prejudiced. No, that's not part of the inquiry,
11 Judge, respectfully. They are not prejudiced as a result of
12 Sungevity for the reasons I previously stated. Otherwise,
13 they are not prejudiced and the prejudice is not something the
14 Court needs to take into account because that is not part of
15 the issue with regard to due diligence, good cause, in other
16 words, which as Your Honor knows is diligence and lack of
17 prejudice to us, to defendants.

18 So the prejudice argument carries no weight.

19 (Transcriber change)

20 THE COURT: Is it your position --

21 MR. CHRISTIE: Yes, Judge.

22 THE COURT: -- that if the Court compares the
23 reduction to practice dates in the invalidity contentions to
24 the answers to Interrogatory 7, they're going to be different?
25 And I'm trying to understand --

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1 MR. CHRISTIE: Yes.

2 THE COURT: -- you're taking the position that
3 they're changing their reduction to practice dates and I want
4 to know where I have to look to document that.

5 MR. CHRISTIE: May I take a moment, please, Your
6 Honor?

7 THE COURT: Of course.

8 (Pause in proceedings)

9 MR. CHRISTIE: The answer to that, Judge, is that in
10 their initial response to invalidity contentions, we didn't
11 get an answer with regard to the -- that issue. But what you
12 do need to do, Judge, is to look strictly at what I've
13 referenced, Exhibit 11, the second supplemental response to
14 Interrogatory Number 7.

15 That document will show earlier iterations of their
16 response as well as the later iterations of their response and
17 show the shifting reduction to practice dates.

18 THE COURT: So -- okay, let's be clear.

19 MR. CHRISTIE: Yes.

20 THE COURT: Is it only going to show me a difference
21 between July 12th and July 19th?

22 MR. CHRISTIE: No, no, no. No, no, no. What it's
23 going to show is their initial response to Interrogatory
24 Number 7, their first supplemental response as well as their
25 second supplemental response, and it's all contained within

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1 Exhibit 11 which is a whooping again 65 pages. So that one
2 document, Judge, if you look seriatim through the various
3 efforts that they made to provide a response to Interrogatory
4 Number 7 --

5 THE COURT: Am I looking at just the 436 patent?

6 MR. CHRISTIE: Sure, Judge. Let's -- you want to
7 take an example, let's take an example. So, for example, if
8 you look on page three of Exhibit 11, the first supplemental
9 response to Interrogatory Number 7, the last -- start at the
10 last full paragraph on that page.

11 THE COURT: So the first supplemental response is
12 dated --

13 MR. CHRISTIE: That's again, Judge, in September of
14 2016.

15 THE COURT: Okay. So let's --

16 MR. CHRISTIE: So --

17 THE COURT: -- let's use this as an example.

18 MR. CHRISTIE: Okay. So they're saying, as you see
19 at the bottom of page three, the invention of the 436 patent
20 was conceived at least as early as the second half of 2006 and
21 the invention was reduced to practice at least as early as
22 April 17, 2007.

23 So then if you shift gears to the second
24 supplemental response to Interrogatory Number 7 which is --
25 the same document, Exhibit 11, page seven, and I'm looking at

1 the paragraph in the middle of the page, you know, we're
2 talking about again with the 436 patent. Again, it says, you
3 know, by no later than January, 2008, we have reduction to
4 practice of the 436 patent.

5 And, you know, further examples, Judge, in the first
6 supplemental response for -- for most if not all of the other
7 patents, they claim a reduction to practice date at least as
8 early as October 31st, 2008. And, you know, then, you know,
9 when you look at the second supplemental, it talks about no
10 later than November, 2006.

11 THE COURT: What page is that?

12 MR. CHRISTIE: So, for example, I'm looking at page
13 11 of Exhibit 11 under the heading the 840 patent, again, the
14 last full paragraph stating in substance, you know, no later
15 than 2006.

16 THE COURT: No, I'm sorry. On page 11 where am I --
17 that's the 840 patent --

18 MR. CHRISTIE: It is. I was giving you another
19 example out --

20 THE COURT: No, no, I want to just -- if we just
21 deal with the 346 patent, you want me to compare the September
22 6th answer --

23 MR. CHRISTIE: Yes.

24 THE COURT: -- second half of 2006 --

25 MR. CHRISTIE: Correct.

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1 THE COURT: -- to --

2 MR. CHRISTIE: Right. Sorry. To page seven --

3 THE COURT: -- page seven where it says January,
4 2008?

5 MR. CHRISTIE: Among other things, Judge --

6 THE COURT: Okay. Among other things.

7 MR. CHRISTIE: -- and I would ask you to read
8 further, because it goes on further.

9 THE COURT: And do the invalidity contentions have
10 the reduction to practice dates?

11 MR. CHRISTIE: No, they punted on that, Judge. They
12 didn't give us anything definitive.

13 THE COURT: Okay. So the second supplemental, is
14 that July 12 or July 19?

15 MR. CHRISTIE: The second supplemental is July 12th.
16 The third supplemental is July 19th.

17 THE COURT: So did they change this and -- did they
18 change this in the third supplemental?

19 MR. CHRISTIE: They did, Judge, and I'll dig that
20 out as well. The third supplemental is Exhibit 12. Okay. So
21 I'm looking again at page 40 of that document, Exhibit 12, in
22 which they are, you know, changing the reduction to practice
23 date for all seven of the asserted patents and --

24 THE COURT: Where are you looking at?

25 MR. CHRISTIE: I'm looking at the bottom half of

1 page 40, starting with the words "Render House." Render House
2 software dated January 5, 2008, reflects an actual reduction
3 to practice with the inventions of the asserted claims, the
4 seven asserted patents.

5 THE COURT: So that's January 5?

6 MR. CHRISTIE: January 5, 2008. So, you know, to
7 the extent one document crystalizes their shifting reduction
8 to practice dates, Judge, this is it. It's here in spades.

9 THE COURT: Okay. So in September, '16 it was at
10 least as early as April 17, 2007, and July 12, '17, it was no
11 later than 2008, and on July 19, it was January 5th, 2008,
12 which is pretty close to January, 2008.

13 MR. CHRISTIE: I understand. But the point, Judge,
14 is they should have known this information before they filed
15 suit. They were obliged to give it to us early. This is
16 basic information that any plaintiff knows in their case.

17 THE COURT: So --

18 MR. CHRISTIE: Yes.

19 THE COURT: -- do the patent rules require these
20 dates to be disclosed, and, if so, where and when?

21 MR. CHRISTIE: Well, you know, based upon -- yes.
22 Based on the local rules as we flashed up on the screen, you
23 know, 3.1 and 3.2 are pretty clear, you know, not later than
24 14 days after the initial scheduling conference we're supposed
25 to -- we're supposed to be getting that information as well as

1 the accompanying documents.

2 But further to the point, Judge, we've cited a bunch
3 of cases which I think are very instructive including Richtek
4 and Harvatek which dispense with these shenanigans. You know,
5 you're supposed to give this information early on, and this is
6 in our brief.

7 But -- and I also want to bring the Court's
8 attention to, you know, Richtek, in particular has very close
9 facts and are parallel to the ones here, you know, the Court
10 denying the motion to amend invention dates because, again,
11 there's a certain pattern that calls here.

12 They're required to give this information early on
13 before we do our invalidity contentions. And by virtue of
14 their holding things close to the vest and delaying and then
15 thrusting it on us at the last minute, it frustrates -- it's
16 not only unfair and prejudicial, but it frustrates the local
17 rules and incentivizes and encourages plaintiffs to do this,
18 which, again, is not something I think the Court --

19 THE COURT: So let's --

20 MR. CHRISTIE: -- wants to encourage.

21 THE COURT: -- let's now zero in on exactly,
22 specifically what you want with regard to these invention
23 dates.

24 MR. CHRISTIE: Yes.

25 THE COURT: Is it only directed to the 436 patent or

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1 is it directed to all patents or some but not all patents?

2 MR. CHRISTIE: It is directed to all patents.

3 Judge, we want to hold them to their original contentions with
4 regard to invention dates.

5 THE COURT: And I -- but I thought you said in their
6 original contentions they didn't put a date.

7 MR. CHRISTIE: Okay. Let me be, you know, let --
8 let me be clear. You know, to the extent that they initially
9 gave us their invention dates, they should be held to those
10 invention dates and not to their supplements after the fact.
11 So --

12 THE COURT: Well, let's take it hypothetically --

13 MR. CHRISTIE: Yes.

14 THE COURT: -- let's take another patent, 840.

15 MR. CHRISTIE: Correct.

16 THE COURT: So what do you want me to do -- what
17 orders do you want me to order?

18 MR. CHRISTIE: Okay. You know, essentially, Judge,
19 we're seeking an order forcing them again to rely on the
20 earliest of their disclosed invention dates.

21 THE COURT: Okay. So you want an order striking any
22 invention dates not included in the December 15 contentions.

23 MR. CHRISTIE: Right.

24 THE COURT: What is there's no date?

25 MR. CHRISTIE: If there's no date, then we also

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1 would like the Court to order them to be held to the earliest
2 date that they have given us.

3 THE COURT: No matter when that was?

4 MR. CHRISTIE: Well, which would be the September,
5 2016, as opposed --

6 THE COURT: Okay.

7 MR. CHRISTIE: -- as opposed --

8 THE COURT: Is there -- is there dates for all of
9 the patents in September, '16?

10 MR. CHRISTIE: I believe so, yes, they are.

11 THE COURT: Okay. So let me be clear. You're
12 requesting that we hold plaintiff to reduction in practice
13 dates -- is that the same as the invention date?

14 MR. CHRISTIE: In essence, yes, Judge.

15 THE COURT: Invention set forth in the 9-16 what,
16 answers to interrogatories or contentions?

17 MR. CHRISTIE: There were -- there were other
18 responses, Judge, at that point in time.

19 THE COURT: Okay. So you want me to say that
20 plaintiffs can't supplement their answers to interrogatories?

21 MR. CHRISTIE: Well, no. You mean, what I'm asking
22 now is for you to order them to be held to their earlier
23 representations with regard to invention dates and not the
24 newly found ones in which they're trying to use to get around
25 Sungevity. Does that make sense?

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1 THE COURT: September, '16 was before -- September,
2 '16 was before Sungevity.

3 MR. CHRISTIE: That's before the issue came before
4 the Court, that's correct.

5 THE COURT: But June, '17 was post-Sungevity --

6 MR. CHRISTIE: That's correct also, Judge.

7 THE COURT: -- and you want those stricken?

8 MR. CHRISTIE: In essence, correct.

9 THE COURT: And in order to do that, I have to say
10 that the standard to amend Interrogatory 7 is the same as to
11 amend the contention under the patent rules?

12 MR. CHRISTIE: Well, what they are essentially doing
13 is trying to have their cake and eat it, too, Judge. They are
14 trying to use, you know, this different vehicle, this
15 interrogatory response to do what they should have done by way
16 of amending their local rule disclosures.

17 So I'm not advocating and saying that all revisions
18 to interrogatory responses should be held to the same
19 standard. What I'm saying, in this instance where they're
20 using the interrogatory responses as a way to get around a
21 formal amendment to their local rule obligations, then, yes,
22 it's applicable under this narrow area.

23 THE COURT: Okay. I want to be clear --

24 MR. CHRISTIE: Yes.

25 THE COURT: -- going back to the priority date

1 issue --

2 MR. CHRISTIE: Correct, yes.

3 THE COURT: -- because I asked you this at the
4 beginning. I thought that the only priority issue left is
5 this alternative date issue. Am I right about that?

6 MR. CHRISTIE: For the most part, and I'm sorry --
7 I'm sorry for belaboring it. You're right that the defendants
8 have pointed out Third Circuit -- I'm sorry, not Third Circuit
9 -- Federal Circuit law, which allows unfortunately for
10 asserting alternative priority dates.

11 The issue that we have with the priority dates is
12 not that they are doing it in the alternative, although we
13 think under the local rules it's inappropriate and Your Honor
14 can make that call, but that they have vacillated. They
15 started out in the alternative. Then when it came to their
16 December, 2016, interrogatory responses, they changed it, and
17 it was just as -- I think we showed earlier, not in the
18 alternative. It was merely April, 2007.

19 What we are asking is that they be held to that
20 subsequent representation, that you can't --

21 THE COURT: And did they change it again?

22 MR. CHRISTIE: And then they changed it back --

23 THE COURT: In your view, right?

24 MR. CHRISTIE: -- and said, oh, no, now it should
25 be --

1 THE COURT: In July, '17?

2 MR. CHRISTIE: In June, 2017, they changed it again
3 back to the alternative.

4 THE COURT: Is that in the contentions or the logs?

5 MR. CHRISTIE: That -- that's in the contentions,
6 Judge.

7 THE COURT: Okay.

8 MR. CHRISTIE: So our point is you can't unring the
9 bell. You've said in September, 2016, unequivocally it is --
10 it is April, 2007. You know, we have the right -- that's a
11 corporate admission. We have the right to hold you to that,
12 and you can't come back now and say, oh, you know, changed the
13 position again, we want to make it alternative between April,
14 2007, and April, 2008. So I hope that helps to crystalize our
15 issues on that -- the priority dates.

16 THE COURT: It does.

17 MR. CHRISTIE: So, again, not merely the alternative
18 basis of alleging them but their shifting between positions
19 over time, if that make sense to the Court?

20 THE COURT: I understand your argument.

21 MR. CHRISTIE: Okay. Thank you, Judge.

22 THE COURT: I guess, plaintiff, I have this question
23 of you now. I think we -- I think it's plain from using the
24 436 patent as an example and looking at Exhibits 11 and 12
25 that the reduction in practice dates changed. But I thought

1 you were taking the position that there was no change in
2 invention dates?

3 MR. ALPER: They -- they haven't changed, Your
4 Honor, and I can explain how that is, so --

5 THE COURT: Okay.

6 MR. ALPER: And then I'll circle back to the issue
7 of how priority and the local rules affect this, but I want to
8 answer your question very directly.

9 So in our first supplemental response, the
10 September, 2016, response -- first of all, I guess you have to
11 start off with what does the interrogatory ask for. I think
12 that's an important thing for context. And the interrogatory
13 asks for the earliest date of conception in reduction to
14 practice.

15 And it doesn't say exclude constructive reduction to
16 practice, which is the type of reduction to practice that
17 occurs when you file a patent application. It doesn't say
18 limit it to when you first put the product together. It just
19 says the earliest date of reduction to practice -- excuse me
20 -- and conception. And so when we look at our -- and that's a
21 requirement for the interrogatory.

22 When you look at our first supplemental
23 interrogatory response which you have in -- you can look at
24 Exhibit -- I have Exhibit 12 which has all of the -- you know,
25 has all the answers. It's on page three of Exhibit 12 for the

1 436 patent.

2 Conception is identified as the second half of 2006,
3 and then it says the invention was reduced to practice at
4 least as early as April 17th, 2007. That date is still in the
5 supplements, but because they asked for more detail, we said,
6 okay, that was related to the filing of an application.
7 Subsequent to that, there was additional work that was done on
8 the products and that culminated in the reduction to practice
9 in the product in January of 2008.

10 Now, in the -- how does this relate to our local
11 rule obligations and so forth? All right. The local rules
12 when it comes to conception, reduction to practice have a
13 requirement in Local Rule 3.2(b) to make a production of
14 documents that relate to the conception and reduction to
15 practice that's before the application date for the patent or
16 the priority date, whatever is earliest. And we did that.

17 And in connection with that production, we produced
18 a document which is a declaration from the applicant that goes
19 through and lays out that -- various dates including this
20 January, 2008, date. We cited that in our first supplemental
21 response, the September, 2016, response, but in accordance
22 with the request in the interrogatory, we put the earlier date
23 of April 17, 2007.

24 When the -- when Sungevity came in the case, we did,
25 as I said, our invalidity contentions and told the plaintiffs

1 in those that our response to Sungevity was going to include
2 showing that our patents came from an earlier date in
3 accordance with the conception dates that we had previously
4 put in here.

5 And at that time, the defendants asked us, we need
6 to know more detail about the whole entire story. And that is
7 when we put the July supplement in which included the earliest
8 date, which is the date that the -- and I can show you where
9 that is, Your Honor, if you'd like to see it in the
10 supplement. It's -- sorry -- it's on page ten.

11 It says -- in the first full paragraph on page ten
12 of Exhibit 12 -- it says, by at least as early as April 17,
13 2007, the inventors constructively reduced to practice the
14 invention, the 436. That's still --

15 THE COURT: On page 12.

16 MR. ALPER: I'm sorry, page ten of Exhibit 12.

17 THE COURT: By at least as early as April 17th,
18 2007.

19 MR. ALPER: So we -- we still put in the earliest
20 date. That's what the interrogatory asked us to do. But in
21 response to the plaintiffs' -- I'm sorry, defendants' request,
22 we detailed out additional parts of the story which were
23 reflected in the documents that we previously had cited in
24 September, including the January, 2008, product basically,
25 actual reduction to practice date.

1 So we -- answering the interrogatory did not change
2 our answer to the interrogatory with the earliest date and
3 then we added stuff at their request. This is all by way of
4 supplements to interrogatories and by way of supplements to
5 interrogatories in view of their addition to Sungevity.

6 And I think that what that brings me to is I want to
7 make a clear distinction between what the local rules require
8 and what -- what is a supplement to an interrogatory and
9 what's a required supplement when you look at the
10 interrogatory itself which only asked for the earliest date of
11 reduction to practice.

12 So if we could go to -- actually plaintiffs' slide
13 had it all, but this is -- this is just good enough, slide 47
14 of our -- of our slides I'll show you. So when it comes to
15 the local rule requirement of what you put in your invalidity
16 contentions itself, it asks -- it talks about priority dates.

17 So it talks about for any patent that claims
18 priority to an earlier application, put the priority date to
19 which each asserted claim is -- allegedly is entitled. That
20 is talking about a claim to an earlier application, that's a
21 priority claim. That is different than what we're calling the
22 invention date which is the date of conception as guided by
23 diligent reduction to practice.

24 And so the local rules when it comes to what you put
25 in your invalidity contentions don't require conception

1 reduction to practice dates to be specified. They do require,
2 under 3.2(b) for you to make that document -- but I don't have
3 it on there. I'm sorry, Your Honor. They -- we were looking
4 at it earlier, I could hand it up if you want from their
5 slides, defendants' slides, but they -- it does require all
6 documents evidencing conception reduction to practice that
7 occur before the -- the priority date.

8 And so -- and we made that production, and I don't
9 think people are arguing about that. So when it comes to the
10 local rule requirement, we put our -- that's where we get the
11 two priority claims in the first part, and two -- it's always
12 been those two priority claims.

13 When it comes to conception reduction to practice,
14 that's when defendants' December 31st, I think it was, 2015,
15 interrogatory comes into play, and that's when we start
16 talking about these various interrogatory -- yes,
17 interrogatory responses.

18 And the two important points there are, first of
19 all, we're not guided by the local rule amendment
20 requirements. This is a supplementation to an interrogatory.

21 And second of all, you have to look at what the
22 interrogatory asks for, and in this case, it's asking for the
23 earliest date. And the earliest dates that we put in our
24 interrogatory response have never changed. And so all we have
25 done -- and this is what I was saying before -- was fill --

1 was do a supplement that added some documents, additional
2 documents to the diligence story and -- largely in 2008.

3 And the one other point that I wanted to make, Your
4 Honor, on this is, I just wanted to direct Your Honor because
5 I want there to be no confusion about this, that if you look
6 at -- back at page three of Exhibit 12 in that -- in that
7 first -- that September, 2016, response to the interrogatory,
8 we say that conception for the 436 patent, as an example, was
9 at least as early as the second half of 2006.

10 And then you go to -- when you go to the supplement
11 in July -- but if you go to either supplement, because this
12 didn't change -- we said that the 436 -- inventions of the 436
13 patent were conceived in the second half of 2006 by no later
14 than December 2nd, 2006, which, of course, is in the second
15 half of 2006. Because -- and that was because defendants
16 asked us to pinpoint a date.

17 We did that. And we showed them where it shows that
18 date, and I can show you on that slide, Mr. Brown, if you
19 could go to it. It's in the materials that we originally
20 produced way back in December 23rd, 2015, in accordance with
21 what is our local rule requirement to produce the conception
22 documents and reduction to practice documents that occurred
23 before your priority claim.

24 And we produced that in December, 2015, before they
25 even ever asked an interrogatory. Because you can see all

1 over this document, it says December 2nd, 2006, and that's --
2 and we put it in our September interrogatory and then we
3 pinpointed it and we cited those documents there, and then we
4 pinpointed it in our July -- July interrogatories.

5 And so when you consider all of that, we have not
6 changed dates. We've faithfully answered their -- we've
7 faithfully complied with the local rules. We've faithfully
8 answered their interrogatory which asked for the earliest
9 dates. And so what we're left with is a supplement which, by
10 the way, they asked us to make, but putting that aside, a
11 supplement that came in view of Sungevity where they -- they
12 said there's no prejudice to us.

13 It's very different. They just now said there's no
14 prejudice. You shouldn't consider prejudice to us. It's very
15 different from what they were saying when we were here before
16 you on their motion to amend when they were saying, to the
17 extent that there's any prejudice, it's erased because they
18 will have a fully opportunity to respond to Sungevity. And
19 Your Honor relied on that in issuing your order.

20 And the final thing that I will say, Your Honor, is
21 this. The case law that defendants are relying on is
22 inapplicable because every one of those cases involved a
23 situation where someone was trying to change the date. They
24 were trying to say I am, in effect -- change their concession
25 date. I'm trying to get an earlier date than what I had said

1 before in order to get behind prior art. We are sticking with
2 the same dates. In fact, if -- we've now -- we've told them
3 we'll take December 2nd.

4 Our earlier response let us go all the way back to
5 the first -- the end of the first half of 2006, but it's even
6 an earlier date. We're actually just pointing to the
7 documents now to -- within that range, essentially towards the
8 tail end of that range.

9 And so none of those cases apply because we are not
10 changing the date, nor do any of those cases have a situation
11 where in order to bring in other prior art, the plaintiff said
12 -- actually said they can -- they can respond in any way that
13 they need to, so there's no prejudice. Thank you, Your Honor.

14 MR. CHRISTIE: May I make three quick points, Judge?

15 Quickly, Mr. Alper conveniently does not point Your
16 Honor to page seven of Exhibit 11 which, again, deals with the
17 436 patent and says, by no later than January, 2008, the
18 inventors had actually reduced the inventions to practice. So
19 he's doing a little bit of obfuscation here, Judge, from our
20 perspective. And, in fact, if you do look at the exhibit as
21 we've stated, there is changes to the reduction to practice
22 dates.

23 Number two, plaintiff has focused on this
24 declaration. Can you get to Slide 37, please. You see that
25 in their Slide 37 they talk about a declaration that Mr.

1 Pershing made to the U.S. Patent Office. You know, they've
2 admitted, Judge, that much of what they included in their
3 supplemental response, the second supplemental response to
4 Interrogatory Number 7 is information that they've had for
5 years because it comes from this declaration that was
6 submitted by Mr. Pershing as part of the prosecution of the
7 436 patent.

8 So, again, this is another example of them having
9 information, holding it close to the vest and failing to
10 provide it in a timely fashion, any interrogatories that we've
11 asked for.

12 And, third, Judge, with regard to their
13 interpretation of the cases, we disagree with plaintiffs as to
14 their applicability. And, again, I've pointed Your Honor to
15 the Richtek and the Harvatek cases which are right on point
16 which demonstrate that their efforts here, plaintiffs' efforts
17 here are inappropriate, and the Court should not countenance
18 it because it does violence to the local rules. It encourages
19 plaintiffs to hold things close to the vest and sandbag
20 defendants later in the case when they should be giving
21 information up front as the local rules require.

22 And plaintiffs' efforts to conflate obligations
23 under the local rules with regard to responding to
24 interrogatories has no merit either, Judge. Again, it's a
25 smoke screen to allow them to skirt their obligations under

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1 the local rules by claiming that they don't -- aren't held up
2 to the high standard because they can just supplement it by
3 way of interrogatory. Thank you.

4 THE COURT: Thank you, counsel. Okay. I think the
5 record's closed. Let me just make a note here.

6 Thank you, counsel --

7 MR. CHRISTIE: Thank you, Your Honor.

8 THE COURT: -- for your excellent briefs and oral
9 argument on some sticky issues. The Court will get out its
10 decision promptly. And if it's not before the Markman
11 hearing, I wish you good luck next week.

12 MR. CHRISTIE: Thank you, Judge.

13 MR. ALPER: Thank you, Your Honor.

14 THE COURT: Have a good week.

15 (Proceedings concluded at 5:06 p.m.)

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C E R T I F I C A T I O N

We, Diane Gallagher, Brenda Boulden and Lois A. Vitarelli, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

October 17, 2017

DIANE GALLAGHER

BRENDA BOULDEN

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